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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Hittafer *v.* Argonne Co. Inc.	183 Fed. Rep. 811	*R.*	Best *v.* Samuel Fox & Co. Ld.	639
Hobbs *v.* London and South Western Ry. Co.	L. R. 10 Q. B. 111	*R.*	Mehmet Dogan Bey *v.* G. G. Abdeni & Co. Ld.	405
Hobbs *v.* Winchester Corporation	[1910] 2 K. B. 471	*R.*	Reynolds *v.* G. H. Austin & Sons Ld.	135
Hobbs *v.* Winchester Corporation	[1910] 2 K. B. 46		Slatcher *v.* George Mence Smith Ld.	631
Holmes *v.* Mather	L. R. 10 Ex. 261	*F.*	National Coal Board *v.* J. E. Evans & Co. (Cardiff) Ld.	861
Holt *v.* Dyson	[1951] 1 K. B. 364		Stewart *v.* Chapman	792
Hopkins *v.* Tanqueray	15 C. B. 130	*Dist.*	Harling *v.* Eddy	739
Horton *v.* London Graving Dock Co. Ld.	[1950] 1 K. B. 421	*Appl.*	Pratt *v.* Richards	208
Hubbuck & Sons *v.* Wilkinson, Heywood & Co.	[1899] 1 Q. B. 86	*R.*	Kemsley *v.* Foot	34
Hughes *v.* Metropolitan Railway Co.	2 App. Cas. 448	*R.*	Combe *v.* Combe	215
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Humphery *v.* Bowers	45 T. L. R. 297	*R.*	Candler *v.* Crane, Christmas & Co.	164
Hunt *v.* Star Newspaper Ld.	[1908] 2 K. B. 309	*R.*	Kemsley *v.* Foot	34
Huntly (Marchioness) *v.* Gaskell	[1905] 2 Ch. 656	*Dist.*	Hill *v.* Luton Corporation	387
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Hyman *v.* Hyman	[1929] A. C. 601	*F.* *R.*	Combe *v.* Combe Bennett *v.* Bennett	215 572

Ilford Urban District Council *v.* Beal	[1925] 1 K. B. 671		National Coal Board *v.* J. E. Evans & Co. (Cardiff) Ld.	861
Indermaur *v.* Dames	L. R. 1 C. P. 274; L. R. 2 C. P. 311	*R.*	Murray *v.* Harringay Arena Ld.	529
Indermaur *v.* Dames	L. R. 1 C. P. 274	*R.*	Pratt *v.* Richards	208
Indermaur *v.* Dames	L. R. 1 C. P.	*R.*	Tinsley *v.* Dudley	18
Inland Revenue Officer *v.* Younger	1930 S. C. 548	*R.*	Cockram *v.* Tropical Preservation Co. Ld.	827
Irvin *v.* Hine	[1950] 1 K. B. 555		Blane Steamships Ld. *v.* Minister of Transport	965
J. F. Perrott & Co. Ld. *v.* Cohen	[1951] 1 K. B. 139	*R.*	Combe *v.* Combe	215
J. & F. Stone Lighting and Radio Ld. *v.* Levitt	[1947] A. C. 209		Rex *v.* Judge Pugh	623
Jackson Stansfield & Sons *v.* Butterworth	[1948] 2 All E. R. 558		Monkland *v.* Jack Barclay Ld.	252
Jackson *v.* Watson & Sons	[1909] 2 K. B. 193		Best *v.* Samuel Fox & Co. Ld.	639
Jardine *v.* Leathly	3 B. & S. 700; 32 L. J. (Q. B.) 132		Blane Steamships Ld. *v.* Minister of Transport	965
Jennings *v.* Kelly	[1940] A. C. 206	*F.*	Rex *v.* Surrey Quarter Sessions	749
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Johnstone *v.* Millinge	16 Q. B. D. 460		William Cory & Son Ld. *v.* London Corporation	476
Jones *v.* Davies	[1901] 1 K. B. 118	*F.*	Taylor *v.* Parry	442
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Joseph Constantine Steamship Line Ld. *v.* Imperial Smelting Corporation Ld.	[1942] A. C. 154	*R.*	Blane Steamships Ld. *v.* Minister of Transport	965
Joseph *v.* Henry	19 L. J. (Q. B.) 369	*R.*	Rex *v.* Fulham, Hammersmith, etc., Rent Tribunal; *Ex parte* Zerek	1
Kat *v.* Diment	[1951] 1 K. B. 34	*R.*	Slatcher *v.* George Mence Smith Ld.	631
Keighley, Maxstead & Co. *v.* Durant	[1901] A. C. 240		Blane Steamships Ld. *v.* Minister of Transport	965
Kenyon *v.* Walker	[1946] 2 All E. R. 595		Rogers *v.* Hyde	923
Kershaw *v.* Sievier	21 T. L. R. 40		Rex *v.* Weisz	611
Kiddle *v.* Lovett	16 Q. B. D. 605	*R.*	Biggin & Co. Ld. *v.* Permanite Ld.	314
King *v.* Earl Cadogan	[1915] 1 K. B. 821; [1915] 3 K. B. 485	*R.*	Rex *v.* Birmingham Rent Tribunal; *Ex parte* Edgbaston Investment Trust Ld.	54
Kitchen's Trustee *v.* Madders	[1950] Ch. 134	*Dist.*	Court *v.* Robinson	60
Knapp *v.* Salsbury	2 Camp. 501		National Coal Board *v.* J. E. Evans & Co. (Cardiff) Ld.	861

Knowles *v.* Roberts	38 Ch. D. 263		Kemsley *v.* Foot	34
Koursk, The	[1924] P. 140		Kohnke *v.* Karger	670
Krauss *v.* Boyne	[1946] 1 All E. R. 543		Rogers *v.* Hyde	923
Kruse *v.* Johnson	[1898] 2 Q. B. 91		William Cory & Son Ld. *v.* London Corporation	476
Kulukundis *v.* Norwich Union Fire Insurance Society	[1937] 1 K. B. 1	*R.*	Blane Steamships Ld. *v.* Minister of Transport	965
Ladd *v.* Gould	1 L. T. 325	*R.*	Wilson *v.* Inyang	799
Langham *v.* Wellingborough Grammar School	101 L. J. (K. B.) 513		Cassidy *v.* Ministry of Health	343
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Laurence *v.* Fox	20 N. Y. 260	*R.*	Candler *v.* Crane, Christmas & Co.	164
Lavelle *v.* Glasgow Infirmary	1931 S. C. (H. L.) 34; 1932 S. C. 245		Cassidy *v.* Ministry of Health	343
Law *v.* Dearnley	[1950] 1 K. B. 400		Rex *v.* Weisz	611
Lawrence *v.* Sinclair	[1949] 2 K. B. 77	*C.*	Williams *v.* Portman (Viscount)	948
Lawrie *v.* Lees	14 Ch. D. 249	*R.*	Downie *v.* Turner	112
Laycock *v.* Pickles	4 B. & S. 497	*R.*	Rex *v.* Weisz	611
Lazarus-Barlow *v.* Regent Estates Co. Ld.	[1949] 2 K. B. 465		Rex *v.* Judge Pugh	623
Leame *v.* Bray	3 East 593	*R.*	National Coal Board *v.* J. E. Evans & Co. (Cardiff) Ld.	861
Ledingham *v.* Bermejo Estancia Co. Ld.	[1947] 1 All E. R. 749	*R.*	Combe *v.* Combe	215
Le Lievre *v.* Gould	[1893] 1 Q. B. 491	*R.* *F.*	Pratt *v.* Richards Candler *v.* Crane, Christmas & Co.	208 164
Leslie & Co. Ld. *v.* Cumming	[1926] 2 K. B. 417	*R.*	Francis Jackson Developments Co. Ld. *v.* Hall	488
Lester *v.* Garland	15 Ves. 248	*C.*	Stewart *v.* Chapman	792
Lewis *v.* Purvis	177 L. T. 267	*R.*	Cumbes *v.* Robinson	83
Lilley *v.* Doubleday	7 Q. B. D. 510	*R.*	Alexander *v.* Railway Executive	882
Limpus *v.* London General Omnibus Co.	1 H. & C. 526	*R.*	Conway *v.* George Wimpey & Co. Ld.	266
Lindsey C. C. *v.* Marshall	[1937] A. C. 97	*R.*	Cassidy *v.* Ministry of Health	343
Linwood *v.* Andrews & Moore	58 L. T. 612		Rex *v.* Weisz	611
Lockhart *v.* Bernard Rosen & Co.	[1922] 1 Ch. 433	*R.*	Butler *v.* Mountview Estates Ld.	563
London Co-operative Society Ld. *v.* Southern Essex Assessment Committee Ld.	[1942] 1 K. B. 53	*Appr. & Appl.*	Thurogood *v.* Van Den Berghs & Jurgens Ld.	537
London Corporation *v.* Cox	L. R. 2 H. L. 239	*R.* *R.*	Rex *v.* Judge Pugh Rex *v.* Fulham, Hammersmith, etc., Rent Tribunal; *Ex parte* Zerek	623 1

London Corporation *v.* Horner	111 L. T. 512	*R.*	Kemsley *v.* Foot	34
London and North Eastern Ry. Co. *v.* Berriman	[1946] A. C. 278	*R.* *R.*	Thurogood *v.* Van Den Berghs & Jurgens Ld. Woolfe *v.* Wexler	537 154
Lory *v.* Great Western Railway Co.	[1942] 1 All E. R. 230		Smith *v.* British European Airways Corporation	893
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Low *v.* Bouverie	[1891] 3 Ch. 82	*C.*	Candler *v.* Crane, Christmas & Co.	164
Luckett *v.* Wood	24 T. L. R. 617		Rex *v.* Weisz	611
Lumley *v.* Gye	2 E. & B. 216	*R.*	Best *v.* Samuel Fox & Co. Ld.	639
Lynch *v.* Knight	9 H. L. C. 577	*C.*	Best *v.* Samuel Fox & Co. Ld.	639
Lyons *v.* Financial News	53 Sol. J. 671	*R.*	Kemsley *v.* Foot	34
Macfadzen *v.* Olivant	6 East 387		Best *v.* Samuel Fox & Co. Ld.	639
Machado *v.* Fontes	[1897] 2 Q. B. 231		Kohnke *v.* Karger	670
McMahon *v.* Field	7 Q. B. D. 591	*R.*	Mehmet Dogan Bey *v.* G. G. Abdeni & Co. Ld.	405
MacManaway, *In re*	[1951] A. C. 161	*R.*	Willcock *v.* Muckle	844
McQuire *v.* Western Morning News Ld.	[1903] 2 K. B. 100	*R.*	Kemsley *v.* Foot	34
Mahmoud *v.* Ispahani	[1921] 2 K. B. 716	*R.*	Woolfe *v.* Wexler	154
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Malcolm Baxter Jr., The	31 Ll. L. Rep. 200	*R.*	Mehmet Dogan Bey *v.* G. G. Abdeni & Co. Ld.	405
Mallett *v.* Dunn	[1949] 2 K. B. 180		Best *v.* Samuel Fox & Co. Ld.	639
Mangena *v.* Wright	[1909] 2 K. B. 958	*R.*	Kemsley *v.* Foot	34
Mann *v.* Mann	[1936] W. N. 92	*R.*	Bennett *v.* Bennett	572
Mann *v.* Merrill	114 L. J. (K. B.) 406	*C.*	Cumbes *v.* Robinson	83
Manton *v.* Brocklebank	[1923] 2 K. B. 212		National Coal Board *v.* J. E. Evans & Co. (Cardiff) Ld.	861
Maple Flock Co. Ld. *v.* Furniture Products (Wembley) Ld.	[1934] 1 K. B. 148		William Cory & Son Ld. *v.* London Corporation	476
Marshall *v.* London Passenger Transport Board	[1936] 3 All E. R. 83	*R.* *Dist.*	Hanily *v.* Minister of Local Government & Planning Hill *v.* Luton Corporation	917 387
Marstrand Fishing Co. Ld. *v.* Beer	56 Ll. L. Rep. 163		Blane Steamships Ld. *v.* Minister of Transport	965
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Mawson *v.* Hartsink	4 Esp. 102	*R.*	Rex *v.* Gunewardene	600

Medina *v.* Stoughton .	1 Salkeld 210 .	*R.*	Shanklin Pier Co. Ld. *v.* Detel Products Ld. .	854
Meering *v.* Graham-White Aviation Co. Ld.	122 L. T. 44 .	*C.*	Tims *v.* John Lewis & Co. Ld. . .	459
Mercer *v.* Pyramid Sand and Gravel Co.	109 J. P. 54 .	*R.*	Slatcher *v.* George Mence Smith Ld.	631
Merivale *v.* Carson . .	20 Q. B. D. 275	*R.*	Kemsley *v.* Foot .	34
Mersey Docks and Harbour Board *v.* Coggins and Griffith (Liverpool) Ld.	[1947] A. C. 1	*R.*	Cassidy *v.* Ministry of Health . .	343
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Mighell *v.* Sultan of Johore	[1894] 1 Q. B. 149	*F.*	Kahan *v.* Pakistan Federation .	1003
Mills *v.* Mills . . .	[1940] P. 124 .	*R.*	Bennett *v.* Bennett	572
Minister of Agriculture & Fisheries *v.* Matthews	[1950] 1 K. B. 148	*C.*	Marcroft Wagons Ld. *v.* Smith .	496
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Monarch S.S. Co. Ld. *v.* Karlshamns Oljefabriker (A/B)	[1949] A. C. 196	*R.*	Mehmet Dogan Bey *v.* G. G. Abdeni & Co. Ld. . .	405
Monkland *v.* Jack Barclay Ld.	[1950] W. N. 387	*Rev.*	Monkland *v.* Jack Barclay Ld. .	252
Montgomery *v.* Liebenthal	[1898] 1 Q. B. 487	*R.*	Kahan *v.* Pakistan Federation .	1003
Moon *v.* London County Council	[1931] A. C. 151		Cockram *v.* Tropical Preservation Co. Ld. . . .	827
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Morris *v.* Robinson . .	3 B. & C. 196	*R.*	Kohnke *v.* Karger	670
Morris *v.* Wise . .	2 F. & F. 51 .	*Appr.*	Tims *v.* John Lewis & Co. Ld. . .	459
Mulliner *v.* Midland Ry. Co.	11 Ch. D. 611	*R.*	William Cory & Son Ld. *v.* London Corporation	476
Murray *v.* Harringay Arena Ld.	[1951] W. N. 38	*Aff.*	Murray *v.* Harringay Arena Ld.	529
Nash *v.* Stevenson Transport Ld.	[1936] 2 K. B. 128		Woolfe *v.* Wexler	154
Neale *v.* Del Soto . .	[1945] K. B. 144	*R.*	Rogers *v.* Hyde .	923
Neptune the Second .	1 Dod. 467 .	*R.*	Cassidy *v.* Ministry of Health . .	343
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Newton and Uxor *v.* Hatter	2 Ld. Raym. 1208		Best *v.* Samuel Fox & Co. Ld. . .	639
New Zealand Shipping Co. Ld. *v.* Société des Ateliers et Chantiers de France	[1919] A. C. 1		William Cory & Son Ld. *v.* London Corporation	476
Nicholson *v.* Field . .	7 H. & N. 810		Thurogood *v.* Van Den Berghs & Jurgens Ld. .	537
Nocton *v.* Ashburton .	[1914] A. C. 932	*C.*	Candler *v.* Crane, Christmas & Co.	164

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North Western Salt Co. Ld. *v.* Electrolytic Alkali Co. Ld.	[1914] A. C. 461	*R.*	Rex *v.* Weisz	611
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Page *v.* Midland Ry. Co.	[1894] 1 Ch. 11	*R.*	Butler *v.* Mountview Estates Ld.	563
Parker *v.* Oloxo Ld.	[1937] 3 All E. R. 524	*R.*	Shanklin Pier Co. Ld. *v.* Detel Products Ld.	854
Parlement Belge, The	4 P. D. 129; 5 P. D. 197	*R.*	Kahan *v.* Pakistan Federation	1003
Parsonage & Co. (Septimus), *In re*	[1901] 2 Ch. 424		Rex *v.* Weisz	611
Parvin *v.* Morton Machine Co.	1950 S. C. 371	*C.*	Thurogood *v.* Van Den Berghs & Jurgens Ld.	537
Pasley *v* Freeman	3 Term R. 51	*R.*	Candler *v.* Crane, Christmas & Co.	164
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Pearson *v.* Lemaitre	5 M. & Gr. 700	*Appl.*	Bridgmont *v.* Associated Newspapers Ld.	578
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Pym *v.* Great Northern Railway Co.	4 B. & S. 396	*R.*	Smith *v.* British European Airways Corporation	893
Radcliffe *v.* Bartholomew	[1892] 1 Q. B. 161		Stewart *v.* Chapman	792
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Reg. *v.* Bolton	1 Q. B. 66	*R.*	Rex *v.* Fulham, Hammersmith, etc., Rent Tribunal; *Ex parte* Zerek	1
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Reg. *v.* Walsall Justices .	18 J. P. 757 .	*R.*	Rex *v.* Torquay Licensing Justices . . .	784
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Rex *v.* Rudge	Peake Add. Cas. 232		Rex *v.* Gunewardene	600
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1923

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Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 1 (*iii*) (*c*) (*iii*). National Coal Board *v.* Amalgamated Anthracite Collieries Ld. **C. A. 227**

1927

Auctions (Bidding Agreements) Act, 1927 (17 & 18 *Geo.* 5, *c.* 12), *s.* 1. Rex *v.* Barnett - - - **C. C. A. 425**

Landlord and Tenant Act, 1927 (17 & 18 *Geo.* 5, *c.* 36), *s.* 4, *sub-s.* 1; *s.* 25, *sub-s.* 1. Williams *v.* Portman (Viscount) - - - **C. A. 948**

Road Transport Lighting Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 37), *s.* 1, *sub-s.* 1; *s.* 15. Thomas *v.* Dando - **Divl. Ct. 620**

1928

Rating and Valuation (Apportionment) Act, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-s.* 1. Cockram *v.* Tropical Preservation Co. Ld. - **C. A. 827**

1930

Poor Law Amendment Act, 1930 (20 *Geo.* 5, *c.* 17), *s.* 14, *sub-s.* 3. Taylor *v.* Parry - - - **Divl. Ct. 442**

Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 7, *sub-s.* 4. Lines *v.* Hersom - - - **Divl. Ct. 682**

—— —— *s.* 10. Gibbins *v.* Skinner **Divl. Ct. 379**

—— —— *ss.* 12, 21. Stewart *v.* Chapman. **Divl. Ct. 792**

—— —— *s.* 19. Parkinson *v.* Axon. **Divl. Ct. 678**

—— —— *s.* 61, *sub-ss.* 1 (*b*) *and* 2; *s.* 72, *sub-ss.* 1 *and* 10. Reynolds *v.* G. H. Austin & Sons Ld. **Divl. Ct. 135**

—— —— *s.* 61, *sub-s.* 2. Victoria Motors (Scarborough) Ld. *v.* Wurzal. **Divl. Ct. 520**

—— —— *s.* 72. Ebbw Vale Urban District Council *v.* South Wales Traffic Area Licensing Authority **C. A. 366**

1933

Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *ss.* 85, 96, *and Sch. III, Part V, cl.* 4. Manton *v.* Brighton Corporation - - **Slade, J. 393**

—— —— *ss.* 226, 228, 229. Pentecost *v.* London District Auditor. **Divl. Ct. 759**

London Passenger Transport Act, 1933 (23 *Geo.* 5, *c.* 14), *s.* 73, *sub-s.* 3; *s.* 80, *sub-ss.* 9, 10, *and* 11. Abbott *v.* London County Council. **C. A. 907**

—— —— *s.* 80, *sub-s.* 9. Abbott *v.* London County Council - **McNair, J. 127**

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32). Cresswell *v.* Hodgson - - - - - **C. A. 92**

—— —— *ss.* 6, 16, *sub-s.* 1. Court *v.* Robinson - - - - **C. A. 60**

—— —— *s.* 16, *sub-s.* 1. Rogers *v.* Hyde. **C. A. 923**

—— —— *Sch.* 1. Dellenty v. Pellow **C. A. 858**

Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 2, *sub-ss.* 4 *and* 5, *s.* 9. Lloyd *v.* E. Lee Ld. **Divl. Ct. 121**

1934

County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 46. Burton *v.* Holdsworth. **C. A. 703**

Road Traffic Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *ss.* 1, 36 *and* 49. Gibbins *v.* Skinner **Divl. Ct. 379**

—— —— *s.* 25, *sub-s.* 1 (*a*) (*b*) (*c*) (*d*) (*e*) (*f*) *and* (*g*). Reynolds *v.* G. H. Austin & Sons Ld. - - **Divl. Ct. 135**

—— —— *s.* 25, *sub-s.* 1. Victoria Motors (Scarborough) Ld. *v.* Wurzal. **Divl. Ct. 520**

1936

Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 71. Watson *v.* Minister of Local Government and Planning. **Devlin, J. 779**

Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 301. Rex *v.* Surrey Quarter Sessions, *Ex parte* Lilley. **Divl. Ct. 749**

Public Health (London) Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 50), *ss.* 1, 5, 84, *sub-s.* 1 (*a*). William Cory & Sons Ld. *v.* London Corporation. **C. A. 476**

1937

Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14, 151, *sub-ss.* 1, 6. Thorogood *v.* Van Den Berghs & Jurgens Ld. - - **C. A. 537**

1938

Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1, *sub-ss.* 1, 3; *s.* 2, *sub-s.* 1. Jarman *v.* Lambert & Cooke Contractors Ld. **C. A. 937**

1939

Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21. Hill *v.* Luton Corporation **Devlin, J. 337**

National Registration Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 91), *s.* 12, *sub-s.* 4; *s.* 6, *sub-s.* 4. Wilcock *v.* Muckle. **Divl. Ct. 844**

Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 *and First Schedule.* Court *v.* Robinson **C. A. 60**

—— —— *s.* 3, *sub-s.* 3. Cumbes *v.* Robinson **C. A. 83**

1943

Catering Wages Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 24). Wrottesley *v.* Regent Street Florida Restaurant **Divl. Ct. 277**

1944

Pensions (*Increase*) *Act*, 1944 (7 *&* 8 *Geo*. 6, *c*. 21). ABBOTT *v*. LONDON COUNTY COUNCIL - - - **C. A. 907**

—— —— *s*. 1, *sub-s*. 1, *Sch. I*, *Pt. II*, *para*. 1. ABBOTT *v*. LONDON COUNTY COUNCIL **McNair, J. 127**

1946

Acquisition of Land (*Authorization Procedure*) *Act*, 1946 (9 *&* 10 *Geo*. 6, *c*. 49), *Sch. I*, *para*. 15. EARL FITZWILLIAM'S WENTWORTH ESTATES CO. LD. *v*. MINISTER OF TOWN AND COUNTRY PLANNING - - **C. A. 284**

—— —— *Sch. I*, *para*. 15. TRAVIS *v*. MINISTER OF LOCAL GOVERNMENT AND PLANNING - - **Devlin, J. 956**

—— —— *Sch. I*, *Part IV*, *paras*. 15 (1), 16. HANILY *v*. MINISTER OF LOCAL GOVERNMENT AND PLANNING **C. A. 917**

Coal Industry Nationalization Act, 1946 (9 *&* 10 *Geo*. 6, *c*. 59), *s*. 10, *sub-s*. 3. NATIONAL COAL BOARD *v*. AMALGAMATED ANTHRACITE COLLIERIES LD. **C. A. 227**

Emergency Laws (*Transitional Provisions*) *Act*, 1946 (9 *&* 10 *Geo*. 6, *c*. 26), *Sch. II*. GIBBINS *v*. SKINNER - - - **Divl. Ct. 379**

Furnished Houses (*Rent Control*) *Act*, 1946 (9 *&* 10 *Geo*. 6, *c*. 34). REX *v*. FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL. *Ex parte* ZEREK **Divl. Ct. 1**

—— —— *s*. 7. REX *v*. FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL. *Ex parte* MARKS **Divl. Ct. 694**

National Health Service Act, 1946 (9 *&* 10 *Geo*. 6, *c*. 81). CASSIDY *v*. MINISTRY OF HEALTH - - - **C. A. 343**

Police Act, 1946 (9 *&* 10 *Geo*. 6, *c*. 46), *s*. 15. WILTSHIRE COUNTY COUNCIL *v*. WILTSHIRE QUARTER SESSIONS STANDING JOINT COMMITTEE - **Divl. Ct. 516**

1947

London County Council (*General Powers*) *Act*, 1947 (11 *&* 12 *Geo*. 6, *c*. *xlvi*), *ss*. 26, 64. REX *v*. LONDON QUARTER SESSIONS. *Ex parte* WESTMINSTER CORPORATION - - - **Divl. Ct. 508**

Pensions (*Increase*) *Act*, 1947 (10 *&* 11 *Geo*. 6, *c*. 7). ABBOTT *v*. LONDON COUNTY COUNCIL - - **McNair, J. 127**

—— —— ABBOTT *v*. LONDON COUNTY COUNCIL **C. A. 907**

Town and Country Planning Act, 1947 (10 *&* 11 *Geo* 6, *c*. 51), *s*. 12, *sub-s*. 2; *s*. 49, *sub-s*. 1; *s*. 118, *sub-s*. 1. HARLOW *v*. MINISTER OF TRANSPORT AND RUGBY PORTLAND CEMENT CO. LD. **C. A. 98**

—— ——*ss*. 23 *and* 24. PERRINS *v*. PERRINS **Divl. Ct. 414**

—— —— *ss*. 23, 51, 55, 75. HIGHAM *v*. HAVANT AND WATERLOO URBAN DISTRICT COUNCIL - - **C. A. 527**

—— —— *s*. 43. TRAVIS *v*. MINISTER OF LOCAL GOVERNMENT AND PLANNING **Devlin, J. 956**

—— —— *s*. 43, *sub-ss*. 1 *and* 2. EARL FITZWILLIAM'S WENTWORTH ESTATES CO. LD. *v*. MINISTER OF TOWN AND COUNTRY PLANNING - **C. A. 284**

Transport Act, 1947 (10 *&* 11 *Geo*. 6, *c*. 49), *ss*. 2, *sub-ss*. 1, 2, (*f*) (*g*) (*i*), 3, 63–5, 76. EBBW VALE URBAN DISTRICT COUNCIL *v*. SOUTH WALES TRAFFIC AREA LICENSING AUTHORITY **C. A. 366**

1948

Agricultural Holdings Act, 1948 (11 *&* 12 *Geo*. 6, *c*. 63), *s*. 1, *sub-ss*. 1 *and* 2. STEVENS *v*. SEDGEMAN **C. A. 434**

—— —— *s*. 24, *sub-ss*. 1 *and* 2. BUDGE *v*. HICKS - - - **C. A. 335**

Criminal Justice Act, 1948 (11 *&* 12 *Geo*. 6, *c*. 58), *s*. 29, *sub-ss*. 1, 3 (*a*) (*d*); *s*. 36, *sub-ss*. 1, 2. REX *v*. LONDON SESSIONS. *Ex parte* ROGERS **C. A. 74**

Gas Act, 1948 (11 *&* 12 *Geo*. 6, *c*. 67), *s*. 25, *sub-ss*. 2, 10. STUDHOLME *v*. MINISTER OF FUEL AND POWER - - **C. A. 804**

—— —— *Sch. III*, *para*. 34. GROVE *v*. EASTERN GAS BOARD **Hilbery, J. 586**

Law Reform (*Personal Injuries*) *Act*, 1948 (11 *&* 12 *Geo*. 6, *c*. 41). SMITH *v*. BRITISH EUROPEAN AIRWAYS CORPORATION. - - - **Hilbery, J. 893**

National Assistance Act, 1948 (11 *&* 12 *Geo*. 6, *c*. 29), *ss*. 1, 42, *Sch. VII*. TAYLOR *v*. PARRY - - - **Divl. Ct. 442**

1949

Landlord and Tenant (*Rent Control*) *Act*, 1949 (12 *&* 13 *Geo*. 6, *c*. 40). REX *v*. FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL. *Ex parte* ZEREK **Divl. Ct. 1**

—— —— *ss.* 1, 2, 18; *Sch. I, Part. I.* Rex *v.* Birmingham (West) Rent Tribunal. *Ex parte* Edgbaston Investment Trust Ld. - - **Divl. Ct. 54**

—— —— *s.* 1. Rex *v.* Judge Pugh. *Ex parte* Graham - - **Divl. Ct. 623**

—— —— *s.* 11, *sub-ss.* 1 *and* 2. Francis Jackson Developments Ld. *v.* Hall **C. A. 488**

Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 1, *sub-s.* 7; *s.* 2, *sub-s.* 2; *s.* 12, *sub-s.* 2. Burton *v.* Holdsworth - - - **C. A. 703**

1950

Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *ss.* 4, 25, *sub-s.* 4. W. Bruce Ld. *v.* J. Strong - - - - **C. A. 447**

RULES, ORDERS, AND INSTRUMENTS JUDICIALLY CONSIDERED

R. S. C., Ord. 18, *rr.* 1, 8, 9. Bridgmont *v.* Associated Newspapers Ld. **C. A. 578**

—— *Ord.* 19, *r.* 27. Kemsley *v.* Foot **C. A. 34**

—— *Ord.* 24, *r.* 4. Kemsley *v.* Foot **C. A. 34**

—— *Ord.* 55b, *rr.* 71, 73 *and* 75. Hanily *v.* Minister of Local Government and Planning - - - **C. A. 917**

Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 4, 5, 24. Pratt *v.* Richards - - - **Barry, J. 208**

Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943 (*St. R. & O.*, 1943, No. 885), *s.* 8. National Coal Board *v.* Amalgamated Anthracite Collieries Ld. - - **C. A. 227**

Defence (General) Regulations, 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 56a (*as amended*), *paras.* 1, 2, 6–8. Woolfe *v.* Wexler - - - **C. A. 154**

Goods Vehicles (Licences and Prohibitions) Regulations, 1936 (*St. R. & O.* 1936, *No.* 269), *reg.* 12, *sub-reg.* 2. Lloyd *v.* E. Lee Ld. - - **Divl. Ct. 121**

Knitted Goods (Manufacture and Supply) Order, 1948 (*S.I.* 1948, *No.* 316, *as amended by No.* 994), *art.* 3 (2); *art.* 3a (1). Patel *v.* Willis **Divl. Ct. 78**

Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950 (*S.I.* 1950, *No.* 1763), reg. 2. Francis Jackson Developments Ld. *v.* Hall. **C. A. 488**

Legal Aid and Advice Act, 1949 (*Commencement*) *Order*, 1950 (*S.I.* 1950, *No.* 1357). Burton *v.* Holdsworth **C. A. 703**

Legal Aid (General) Regulations, 1950 (*S.I.* 1950, *No.* 1359), *reg.* 17. Burton *v.* Holdsworth - - **C. A. 703**

Stopping Up of Highways (Bedfordshire) (No. 1) *Order*, 1949 (*S.I.* 1949, *No.* 2130). Harlow *v.* Minister of Transport and Rugby Portland Cement Co. Ld. **C. A. 93**

Town and Country Planning (Development Charge) Regulations, 1948 (*S.I.* 1948, *No.* 1189), *reg.* 2; *Sch., para.* 1. Earl Fitzwilliam's Wentworth Estates Co. Ld. *v.* Minister of Town and Country Planning **C. A. 284**

Utility Mark and Apparel and Textiles (General Provisions) Order, 1947 (*St. R. & O.* 1947, *No.* 2642), *art.* 18 (4). Patel *v.* Willis - - **Divl. Ct. 78**

Wages Regulation (Unlicensed Place of Refreshment) Order, 1949 (*S.I.* 1949, *No.* 433). Wrottesley *v.* Regent Street Florida Restaurant **Divl. Ct. 277**

ERRATUM

P. 345. Cassidy *v.* Ministry of Health. Junior counsel for the defendants was *Andrew Rankin.*

P. 694. Rex *v.* Fulham, Hammersmith and Kensington Rent Tribunal. *Ex parte* Marks was reported by P. B. Durnford, Esq.

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

REX *v.* FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL; *Ex parte* ZEREK.

1951
Jan. 25;
Feb. 2.

Lord Goddard, C.J., Humphreys and Devlin, JJ.

Rent tribunal—Reference by tenant—Tenant's allegation of oral agreement to let unfurnished—Allegation by landlord that letting furnished—Tribunal's jurisdiction to determine nature of letting—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34)—*Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40)—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10.

A landlord let two rooms in his house to a tenant at a weekly rent of 35*s*. The tenant referred the letting to a rent tribunal under the Landlord and Tenant (Rent Control) Act, 1949. At the hearing the landlord produced to the tribunal a document signed by the tenant and referring to the letting as a furnished one, and he relied on that document as proving that the rooms were let furnished, so that the reference was out of order because not made under the Furnished Houses (Rent Control) Act, 1946. The tenant stated that the rooms had been let to him unfurnished by an earlier oral agreement, but that when he arrived with his furniture to take possession of them the landlord refused to admit him unless he agreed to hire his furniture to the landlord for a year and to execute the document on which the landlord relied. No alteration in the agreed rent was suggested by the landlord. The tribunal, being of the opinion that the written agreement was not valid, decided that the rooms had been let unfurnished, and that they

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therefore had jurisdiction to hear the reference, and they reduced the rent to 15s. a week. On the application of the landlord for an order of certiorari for the quashing of their determination on the ground that, as there was a written agreement describing the letting as a furnished one, the tribunal had no jurisdiction to hear the reference and could not inquire into the bona fides of the transaction:—

Held, that the tribunal were entitled to satisfy themselves whether the letting was, for the purposes of the Rent Restriction Acts, of furnished or unfurnished rooms; that, since by those Acts a letting was not to be regarded as furnished unless the amount of rent which was fairly attributable to the use of furniture formed a substantial part of the whole rent, the letting in question was an unfurnished one because no part of the 35*s.* rent, which had been fixed as for an unfurnished letting, was attributable to the use of the furniture; and that the tribunal therefore had jurisdiction to hear the reference.

Rex v. *Hackney, etc., Rent Tribunal*; *Ex parte Keats* (*post*, p. 15) distinguished and criticized.

The document in question was insufficiently stamped. The court without ruling that the tribunal, not being a court of law, arbitrators or referees, were not entitled to look at it, sent the document to the Commissioners of Stamps.

Per Lord Goddard, C.J. In so far as *Rex* v. *Hackney, etc., Rent Tribunal*; *Ex parte Keats* laid down that in no case can a tribunal inquire into the genuineness of a tenancy agreement, it goes too far and ought not to be followed. But if the tribunal do embark on such an inquiry they must proceed on the principles on which a court of equity would act, and on such evidence as the court would require in a suit for rectification, except that the oral evidence may be unsworn. Written agreements, especially when executed after professional advice, are not to be lightly set aside.

Application for an order of certiorari.

The applicant, Boleslaw Zerek, let two rooms in his house at 57, Golborne Gardens, to a tenant at a weekly rent of 1*l.* 15*s.* The tenant referred the letting to a rent tribunal under the Landlord and Tenant (Rent Control) Act, 1949. At the hearing of the reference on September 8, 1950, the landlord produced to the tribunal a document dated March 18, 1950, signed by the tenant, in which he agreed to take two furnished rooms; and he contended that this proved the letting to be of furnished rooms and that, therefore, the tribunal had no jurisdiction to entertain a reference under the Act of 1949.

The tenant stated that the rooms had been let to him unfurnished by an oral agreement, but that, when on March 18 he went with his furniture to take possession of them, the landlord refused to allow him to do so unless he agreed first to hire to the landlord his (the tenant's) furniture for a year and then to take the rooms with that furniture in them. He was then told to sign the document of March 18, and another one purporting to be a receipt by him for 12*l.* paid by the landlord for the hire of the furniture, a sum which, he said, he had not received.

The tribunal, on the statements before them, decided that the document of March 18 was not a valid agreement for a furnished letting, and that they accordingly had jurisdiction to entertain the reference. They reduced the rent to 15*s.* a week.

The landlord now applied for an order of certiorari on the ground that, in view of the written document of March 18, the tribunal had no jurisdiction to entertain the reference as that showed the rooms to be furnished so that the reference should have been under the Furnished Houses (Rent Control) Act, 1946, and that, in view of the decision in *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (1) the tribunal could not go beyond the memorandum and inquire into the bona fides of the transaction.

Morris Finer for the applicant. The tribunal had no jurisdiction to entertain the reference under the Landlord and Tenant (Rent Control) Act, 1949, as the letting was of furnished rooms. Furthermore, they had no power to inquire into the bona fides of the document of March 18. The present case is indistinguishable from that of *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (1), where this court decided that the tribunal had no power to go behind a written agreement. Lord Goddard, C.J., there said of the tribunal's assumption of authority to decide whether a written agreement was genuine or not: " A more " dangerous assumption of power by one of these tribunals it is " impossible to imagine ". Although a tribunal may inquire into collateral facts in order to ascertain whether they have jurisdiction, an allegation of duress on the part of the landlord, such as was made here, is not within the rule.

It is submitted that there is a line beyond which an inquiry of this nature becomes a mere roving inquiry into facts which are collateral to collateral facts. There is an apparent conflict between the decision in *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (1) and *Rex* v. *City of London Rent Tribunal; Ex parte Honig* (2), which it is open to this court to resolve. *Rex* v. *City of London Rent Tribunal; Ex parte Honig* (2) lays down no new principle at all: it is the application of established principles to particular facts. The principle which is applicable to this case emerges from *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (1): it shows the boundary beyond which tribunals may not go.

(1) Post, 15.
(2) [1951] 1 K. B. 641.

The line is drawn at the point where it would be unreasonable to permit the tribunal to determine the collateral issue because it is (i) very remote from the real question which the tribunal exist to decide, and (ii) unsuitable in its own nature for determination by the informal methods of the tribunal. It is unreasonable to permit questions of fraud, forgery, duress and the like—although they arise upon an inquiry collateral to the establishment of jurisdiction—to be decided by a tribunal who make their own rules of evidence and before whom there is no right of cross-examination and no power to subpœna witnesses to give evidence or to produce documents.

Ashworth for the tribunal. There are three grounds for supporting the tribunal's decision. First, a tribunal have jurisdiction to determine the terms of the tenancy between the parties in order to see whether they have jurisdiction to entertain the reference. It was directly decided by this court in *Rex* v. *City of London Rent Tribunal; Ex parte Honig* (4), where the issue was whether a tenancy had been determined by a certain notice to quit, that the tribunal had power to investigate that matter to see whether there was or was not an existing tenancy. Tribunals have jurisdiction if a certain state of affairs exists and they must decide in each case, where it is disputed, whether the required state of affairs exists. Their decision on those facts is then open to review by a higher authority: see *Rex* v. *Lincolnshire Justices; Ex parte Brett* (5). That question was not referred to in *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (6), which was decided on the wrong grounds although the ultimate result was right.

Secondly, assuming that this tribunal were bound by the written document, the rooms were not furnished ones within the meaning of the Rent Acts because the amount of rent which was attributable to the use of furniture did not form a substantial part of the rent: this is clearly so because the rent for the rooms in question was the same when they were "furnished" as when they were unfurnished. The Landlord and Tenant (Rent Control) Act, 1949, must be read in conjunction with the principal Acts, and therefore the definition of a furnished letting in s. 10 of the Rent Restriction Act of 1923 applies. Even assuming that the tribunal were wrong in deciding that they could altogether disregard the document of March 18, they still had jurisdiction by virtue of s. 10 of the Act of 1923.

Thirdly, there was an oral agreement to let the rooms unfurnished before the document which purported to let them furnished. On the authority of the Court of Appeal's decision

(4) [1951] 1 K. B. 641.
(5) [1926] 2 K. B. 192.
(6) Post, 15.

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in *Stagg* v. *Brickett* (7), where a letting which is originally of one character is changed to a letting of another character, the character of the letting for the purposes of the Rent Restrictions Acts is prima facie the original one; and the question of an alleged change in the character of a letting must be considered with especial regard to the rent payable. As the rent of these rooms remained precisely the same after the document of March 18, the character of the letting remained unchanged, and therefore they were still unfurnished rooms.

Finer in reply. The tribunal never brought their minds to bear on the question whether, assuming that the document of March 18 was genuine, the letting might still be unfurnished within the meaning of proviso (i) to s. 12, sub-s. 2, of the Rent and Mortgage Interest (Restrictions) Act, 1920. There is no sufficient evidence before this court upon which it can now decide that question. If the contention of the tribunal is correct, the decision in *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (8) is wholly wrong. There is no middle way. The acute problem which is raised by this application is whether there are any limits to the capacity of tribunals to inquire into matters which are collateral. All the older authorities on certiorari concern the different question whether the particular question purported to be decided was or was not collateral to the determination of the existence of jurisdiction. It is submitted that it is open to this court to say that there is a boundary beyond which an administrative tribunal may not pursue issues collateral to their jurisdiction.

Cur. adv. vult.

February 2. LORD GODDARD, C.J., reading his judgment, stated the facts and continued: It was said that according to the decision of this court in *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (8) the tribunal had no jurisdiction to inquire into the bona fides of the transaction, and as there was a written memorandum describing the letting as one of furnished rooms they could go no further. In my opinion there is one short and conclusive answer to this contention: the Landlord and Tenant (Rent Control) Act, 1949, is one of a group of statutes generally referred to as the Rent Restriction Acts. Those Acts are the Rent and Mortgage Interest Restriction Acts, 1920 to 1939, which throughout this Act are referred to as the principal Acts and are so defined in s. 18, and also the Furnished Houses (Rent Control) Act, 1946. The effect of s. 10 of the Act of 1923 is that a letting is not to be regarded as a furnished letting unless the amount of rent which is fairly attributable to the use of furniture forms a substantial portion of the whole rent. If, therefore, unfurnished rooms are offered to a tenant at 35*s.* per week and thereafter some furniture, even if it admittedly belongs to the landlord, is put into them and the rooms are then let furnished at the same rent, it is clear that no part of the rent can possibly be attributable to the use of furniture and the rooms must, for the purposes of the Acts, be regarded as unfurnished, and therefore subject to the Act of 1949.

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(7) [1951] 1 K. B. 648.

(8) Post, 15.

Apart, therefore, from the question whether any part of the transaction is bogus or genuine, the tribunal must satisfy itself whether the letting is, for the purposes of the Acts, of furnished or unfurnished rooms, and in this case there could be but one answer. In order to proceed with the reference there was no need for the rectification of the agreement of March 18. A landlord may let a house or rooms in which there is furniture and it may be described as a furnished letting, but for the purposes of the Acts it will nevertheless be deemed an unfurnished letting unless the amount of rent fairly attributable to the use of furniture forms a substantial part of the whole rent, and as there was no need for rectification this fact alone distinguishes this case from *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (8).

It was, however, submitted on behalf of the tribunal that in any event that case went too far and is inconsistent with the later case, *Rex* v. *City of London Rent Tribunal; Ex parte Honig* (9). In that case this court held that it was competent for the tribunal to inquire whether there was an existing tenancy because that was collateral to the question which the tribunal had to decide, namely, the reasonable rent under an existing tenancy. If there was no tenancy there was nothing upon which the tribunal could adjudicate. The law to be gathered, especially from *Reg.* v. *Income Tax Special Commissioners* (10) and *Rex* v. *Lincolnshire Justices; Ex parte Brett* (11) is that if a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; and this court may, by means of proceedings for certiorari, inquire into the correctness of the decision. The decision as to these facts is regarded as collateral because, though the existence of jurisdiction depends on it, it is not the main question which the tribunal have to decide.

Rex v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (8) was certainly an extreme case, so much so that it was not seriously contended that the action of the tribunal could be

(8) Post, 15.
(9) [1951] 1 K. B. 641.
(10) (1888) 21 Q. B. D. 313.
(11) [1926] 2 K. B. 192.

upheld. An agreement executed after the parties had had professional legal advice was produced whereby the premises were let to the tenant, who undertook to use them only for the purpose of a tailoring business and made provision for the tenant bearing any development charge which might become payable under the Town and Country Planning Act, 1947. The tribunal, on the mere word of the tenant, held that the agreement was a sham and, in effect, absolved him from what in a deed would have been a restrictive covenant. I was a party to that decision and delivered the judgment. I am satisfied that the result was right, but the argument in the present case has also satisfied me that the grounds on which the judgment proceeded were wrong. It should have been based on the ground that the finding was one which on the facts this court would not uphold. The mere statement of one of the parties without more was not evidence which would justify any tribunal holding that an agreement was a sham ~~or~~ that a restriction inserted therein was never intended to apply. It was, in fact, just the sort of case envisaged by Atkin, L.J., in *Rex* v. *Lincolnshire Justices; Ex parte Brett* (13). But if our judgment lays down, as I think in effect it does, that in no case can a tribunal inquire into the genuineness of an agreement, it goes too far and ought not to be followed. For my part I would say that if they do embark on such an inquiry they must proceed on the principles on which a court of equity would act, and on such evidence as the court would require in a suit for rectification, subject, of course, to oral evidence being unsworn, as they have no power to administer an oath. Written agreements, more especially when executed after professional advice and assistance, are not to be lightly set aside.

In the present case, for the reasons given earlier in this judgment, no such question arises and accordingly the application fails.

There is one other matter which, though immaterial for the purpose of the decision, cannot be passed over without notice. The document produced by the landlord, and on which he relied as a memorandum of agreement, was improperly stamped. It may be that he required the tenant to sign over a stamp with a view to impressing on him that it was a formal document, but the document would in any case have required a sixpenny stamp. Had he attempted to put it in before a court of law, an arbitrator or a referee, it could not have been looked at without requiring him to pay the proper stamp duty and a penalty of 10*l*. These tribunals cannot be described as courts of law for the reasons which this court pointed out in *Rex* v. *Brighton and Area Rent Tribunal; Ex parte Marine Parade Estates* (1936) *Ld.* (14); nor

(13) [1926] 2 K. B. 192.

(14) [1950] 2 K. B. 410.

are its members arbitrators or referees. We could not say, therefore, that they were not entitled to look at the document, and, as we have to consider whether their decision was within their jurisdiction, it is necessary for us to look at the same evidence as was before them. It will be for the Commissioners of Stamps to determine what, if any, action they should take in view of what appears to be a deliberate understamping of the document; and it will accordingly be sent to them by the court.

HUMPHREYS, J. I agree with the decision come to by my Lord, and broadly on the same grounds; but, as this matter has been referred to us as being of some importance, I have put down my own views in a short judgment. The sole question raised on this application for certiorari is one of jurisdiction. No question arises as to the proper determination in a matter of disputed evidence.

The submission is, as stated in the affidavit of the applicant's solicitor, that the tribunal had no power to determine the preliminary question whether the letting was a furnished or unfurnished letting. Mr. Finer conceded that the tribunal were entitled, and, indeed, were bound, to satisfy themselves that they had jurisdiction to inquire into the facts of the case and to consider the various documents, including the answers of landlord and tenant on the statutory forms, and the so-called receipt for 12*l.* I do not think that he queried the right of the tribunal to hear statements, though not on oath, by the parties upon this question. If authority is needed for that course it will be found in the judgment in the case of *Rex* v. *City of London Rent Tribunal; Ex parte Honig* (15). In that case there was no documentary evidence as to the nature of the tenancy, whether it ran from Saturday to Saturday or Monday to Monday. I agree with Mr. Finer that, when the documentary evidence is clear and unambiguous, the tribunal have no power, on the mere statement of a party that the document signed by him is a sham, to disregard that document; nor do I think that the tribunal are invested with any power to decide a question of law. I am disposed to agree with him that the question of the limits of the jurisdiction of the tribunal is to some extent a matter of degree.

The decision in *Rex* v. *City of London Rent Tribunal; Ex parte Honig* (15) may be contrasted with that in *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (16), a decision to which I was a party. In that case premises which had been used as a dwelling-house were let for tailoring purposes only. There was no ambiguity in the terms of the lease, which was settled by solicitors for the landlord and tenant respectively. Any other decision than that arrived at by the court would have left it open to any tenant holding under a written agreement to inform the tribunal that the document was a sham and thereby obtain a reduction of his rent. There are dishonest tenants as well as grasping landlords, and in my opinion any such decision would have been unjust as well as illegal. Upon consideration my opinion still is that the decision in that case was, upon the facts, correct.

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(15) [1951] 1 K. B. 641.

(16) Post, 15.

In the present case the facts presented to the tribunal, and not contradicted, showed that the premises at the date of the letting were unfurnished, such furniture as was put into them was brought there by the tenant and was not at any time the property of the landlord. Further, the rent was not increased when, according to the contention of the landlord, the letting became a furnished one. Upon those facts being brought to their notice, the tribunal were in my opinion not acting without jurisdiction in holding that the letting was an unfurnished one.

Having had the advantage of reading the judgment of my Lord, I desire to add that I agree with him that the question in this case might be decided on the short ground that the premises in question were clearly not furnished premises within the meaning of the Rent Restriction Acts. It followed that they must have been the subject of an unfurnished letting, and that the tribunal therefore had jurisdiction.

In my judgment the application for an order of certiorari fails.

DEVLIN, J. The Landlord and Tenant (Rent Control) Act, 1949, s. 1, provides that where, apart from the section, the standard rent of a dwelling-house would be the rent at which it was let on a letting beginning after September 1, 1939, the landlord or the tenant may apply to the tribunal to determine what rent is reasonable and the tribunal shall determine that rent. It is agreed that the word "dwelling-house" does not apply to furnished premises which are outside the provisions of the Rent Acts, 1920 to 1939.

[His Lordship stated the facts and continued:] It is not disputed that proof of the fact that this is an unfurnished tenancy is a pre-requisite to the exercise by the tribunal of their jurisdiction under s. 1 to fix a reasonable rent. Likewise it is agreed that since the tribunal's jurisdiction depends upon the existence of an unfurnished tenancy, it cannot, in the pithy phrase that was used in *Reg.* v. *Bolton* (17), and before, give itself jurisdiction merely by its affirmation of the fact: see also *per* Coleridge, J., in *Bunbury* v. *Fuller* (18). This has been qualified in the terms laid down by Lord Esher, M.R., in *Reg.*

(17) (1841) 1 Q. B. 66.

(18) (1853) 9 Ex. 111, 140.

v. *Income Tax Special Commissioners* (19); but it is not suggested, and, indeed, the contrary has been settled by this court, that that qualification applies here.

It is therefore agreed that the finding of the tribunal that the tenancy was unfurnished cannot be conclusive. Mr. Ashworth, on behalf of the tribunal, submits that it had a right, and, indeed, a duty, to make a finding about the nature of the tenancy, subject to review by this court. Mr. Finer, for the applicant, agrees that in a proper case there may be such a right, but argues that it must be limited. It cannot extend to require or permit the tribunal to investigate questions for the determination of which they are by their constitution wholly unsuited, such as whether an agreement is a forgery or has been obtained by fraud or is a sham, which last is what they purported to decide in this case. I do not think that he was able to suggest any principle which would show where the line was to be drawn, except the rather vague one that there must be excluded from the investigation questions which it was inconvenient and undesirable that such a tribunal should investigate. For the contention that there must be some limit he relied upon the recent decision in *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (20), in which this court decided that the tribunal had no power to determine that a provision in a formal tenancy agreement was a sham.

In my opinion the argument on behalf of the applicant is based on a misconception of what it is that a tribunal in cases such as this is doing. When, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to their jurisdiction, the tribunal have to make up their minds whether they will act or not, and for that purpose to arrive at some decision on whether they have jurisdiction or not. If their jurisdiction depends upon the existence of a state of facts, they must inform themselves about them, and if the facts are in dispute reach some conclusion on the merits of the dispute. If they reach a wrong conclusion, the rights of the parties against each other are not affected. For, if the tribunal wrongly assume jurisdiction, the party who apparently obtains an order from it in reality takes nothing. The whole proceeding is, in the phrase used in the old reports, coram non judice. If, for example, the applicant in this case wishes, he can sue for his 35*s*. rent. He will be met with the defence that by the order of the tribunal it has been reduced to 15*s*. He can reply that that order is bad for want of jurisdiction, and the defendant will have to justify the order on which he relies and so prove the facts which give the tribunal jurisdiction. This seems to me to be what is laid

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(19) 21 Q. B. D. 313, 319.

(20) Post, 15.

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down by the decision in *Briscoe* v. *Stephens* (21), and to be in accordance with the opinion of Willes, J., in *London Corporation* v. *Cox* (22). In such an action, I apprehend, the findings of the tribunal would be irrelevant and inadmissible. They are findings in a preliminary inquiry whose only object is to enable the tribunal to decide for themselves how to act. They are findings, therefore, that cannot ultimately prejudice either party. In these circumstances, I am unable to see why the tribunal should, in making their preliminary inquiry, be restricted to any particular class of case, or how they can be restrained from investigating for their own purposes any point which they think it necessary to determine so that they can decide upon their course of action.

I should perhaps say that we have heard no argument about the rights of the parties as between themselves; and the tenant was not represented. I have stated what appears to me, without hearing argument on it, to be the position between the parties, so as to contrast it with the matters with which I believe this court to be concerned when it is asked to make an order of certiorari.

Orders of certiorari and prohibition are concerned principally with public order, it being part of the duty of the High Court to see that inferior courts confine themselves to their own limited sphere. They also afford speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal. But they are not designed to raise issues of fact for the High Court to determine de novo. Accordingly, it has never been the practice to put the party who asserts that the inferior court has jurisdiction to proof of the facts upon which he relies. It is recognized that the inferior court will have made a preliminary inquiry itself and the superior court is generally content to act upon the materials disclosed at that inquiry and to review in the light of them the decision to assume jurisdiction. This is possible only because the court is not, as I conceive it, finally determining the validity of the tribunal's order as between the parties themselves (except, perhaps, in a case such as *Symons* v. *Rees* (23), where the court investigated for itself the facts and pronounced upon them), but is merely deciding whether there has been a plain excess of jurisdiction or not. Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there. But where the dispute turns on a question of fact, about which there is a conflict of evidence, the court will generally decline to to interfere.

(21) (1824) 2 Bing. 213.
(22) (1867) L. R. 2 H. L. 239, 262.
(23) (1876) 1 Ex. D. 416.

The practice which I have set out above has been settled mainly in relation to writs of prohibition, but I think it equally applicable to certiorari. *Thompson* v. *Ingham* (24) was a case in which the jurisdiction of a county court was challenged, it being admitted that if the title to land was in question the court had no jurisdiction. The county court judge heard evidence on both sides and decided that the title was not in question. Patteson, J., giving the judgment of the court, said (24): "The "question must be open to one of the superior courts on motion "for a prohibition, by affidavit; and, if that court, as in the "present case, directs that the party should declare, then the "question becomes one of evidence".

But a few months later, in *Joseph* v. *Henry* (25), where a county court's jurisdiction was again in question, Coleridge, J., who had been a member of the court which had decided *Thompson* v. *Ingham* (26), said that it applied only to a case in which the court sees undoubtedly that there was no jurisdiction. But, he said, in this case there were conflicting affidavits (27): "and "if I were to make this rule absolute, I should establish a precedent for reviewing the decision of the judge in every case "where his jurisdiction depended upon conflicting evidence, "which would be full of inconvenience and contrary to all "principle".

Although this last dictum was obiter, it was made the basis of future practice. In *Brown* v. *Cocking and Others* (28) the headnote states: "*Held*, the county court judge having decided "on conflicting evidence that the value of the premises did not "exceed 20*l*., that the court could not review his decision by "prohibition, though on a point going to his jurisdiction only". Cockburn, C.J., said (28) that the court could not look to see whether the decision was, on the balance of evidence, right or not: "When the judge has gone into the evidence we are precluded from going into the matter and are bound by his "decision". Lush, J., said (28): "I think the judge's decision "is conclusive when there was evidence before him on which he "might decide as he has done. We cannot issue a prohibition "unless it be clearly shown that the inferior court has done something which it has not jurisdiction to do". Hannen, J., queried whether the court was actually precluded from reviewing the decision but thought that in a case of nicety it ought not to interfere.

That decision was followed in *Elston* v. *Rose* (29), though Cockburn, C.J., there put the point a little less strongly. He said (29): "If there has been a real conflict of testimony upon "some fact which goes to the question of jurisdiction, the court "will not interfere, except upon very strong grounds". Blackburn, J. said (29): "I am quite prepared to hold that if the "evidence upon that point was conflicting, that circumstance, "though not conclusive upon us, so as absolutely to deprive us "of the discretionary power of granting the prohibition, would "so far influence us, that we should require very strong grounds "before we should interfere". In *Turner* v. *Kingsbury Collieries Ld.* (30), McCardie, J., went further, perhaps too far, in saying that a decision on fact could not be questioned on prohibition.

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(24) (1850) 14 Q. B. 710, 719.
(25) (1850) 19 L. J. (Q. B.) 369.
(26) 14 Q. B. 710.
(27) 19 L. J. (Q. B.) 372.
(28) (1868) L. R. 3 Q. B. 672, 676.
(29) (1868) L. R. 4 Q. B. 4, 7, 8.

These principles seem to me to be equally applicable to certiorari, though there is no case in which they have been applied so explicitly. In *Rex* v. *Lincolnshire Justices; Ex parte Brett* (31) Atkin, L.J., quoted with approval the passage in Halsbury's Laws of England, now to be found in vol. 9, sect. 1485, p. 881, which states: "The superior court may upon "certiorari inquire into the correctness of the decision and may "quash the proceedings in the lower court if such decision is "erroneous, or at any rate if there is no evidence to support it". In *Rex* v. *City of London Rent Tribunal; Ex parte Honig* (32) Parker, J., said that the onus was on the applicant to show that the decision of the tribunal was erroneous; and where that depended almost entirely on oral testimony the onus was particularly high.

Rex v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (33) was, I think, for the reasons which my Lords have given, a very exceptional case. I do not treat it as laying down as a general principle that a tribunal ought never to investigate a suggestion that an agreement is a sham. A formal tenancy agreement, carefully negotiated between the parties, is not lightly to be condemned as a sham, and the burden of proof on him who asserts that it was is very heavy. If the court in that case was satisfied, as I think that it was, that there was really no evidence to discharge that burden, the decision was plainly right.

Although tribunals may in my view and in default of any alternative have to determine for themselves in the first instance the extent of their jurisdiction, nothing that I have said means that they should take upon themselves unnecessarily the examination of questions such as those in *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (33), or in cases where charges of fraud or forgery and the like are raised. Their own good sense

(29) (1868) L. R. 4 Q. B. 4, 7, 8.
(30) [1921] 3 K. B. 169, 174.
(31) [1926] 2 K. B. 192, 201.
(32) [1915] 1 K. B. 641.
(33) Post, 15.

will tell them that. While they will not allow every empty threat to their jurisdiction to deter them from their proper business of fixing reasonable rents, they will likewise appreciate that they are not by their nature equipped for the trial of matters which in the ordinary civil courts would be determined after pleading and discovery had been given and evidence on oath tested by cross-examination, and possibly, also, after trial by jury. The tribunal cannot be required to determine summarily such an issue if it involves a point of substance and if one or other of the parties is willing to have it determined in the ordinary civil courts; an adjournment can always be granted to allow that to be done. This will avoid an inconclusive inquiry by the tribunal and safeguard the tenant against the danger of being presented with an order which may afterwards turn out to be illusory. It may well be that if the tribunal itself insist, notwithstanding that there is a practicable alternative offered to them, in going into points of the sort which they purported to determine in *Rex* v. *Hackney, etc., Rent Tribunal; Ex parte Keats* (33) there is power in this court to prevent them from doing so. It is quite unnecessary that I should even consider that in relation to the present case, for this tribunal were quite willing that the validity of the alleged agreement should be determined by the ordinary courts, and I think that that would be the attitude of most tribunals.

I need say little upon the facts of the present case, which have been fully dealt with by my Lords. Had there been a conflict of evidence, this court would probably not have interfered. But in fact the evidence was all one way and ample to justify the tribunal's conclusion that the document was not intended by the parties as a reduction into writing of their oral agreement, but as a bogus document which the landlord had brought into existence for his own purposes. Having regard to the receipt for the hire of the furniture, about which the landlord offered no explanation, the matter was in my view so clear as not to raise any serious issue. The tribunal's decision to assume jurisdiction cannot, therefore, be questioned in these proceedings.

Application refused.

Solicitors: *Arnold A. Finer; The Solicitor, Ministry of Health.*

S. C.

(33) Post, 15.

Distinguished. REX *v.* FULHAM, ETC., RENT TRIBUNAL [1951] 2 K. B. 1

NOTE.

REX *v.* HACKNEY, ETC., RENT TRIBUNAL; *Ex parte* KEATS.

1950
May 11.

Lord Goddard, C.J., Humphreys and Morris, JJ.

APPLICATION for an order of certiorari.

The applicant sought a writ of certiorari to quash a decision of the rent tribunal. The facts appear in the judgment of Lord Goddard, C.J.

A. P. Marshall, K.C., and *F. R. McQuown* for the applicant.
Ashworth for the rent tribunal.

LORD GODDARD, C.J. Premises consisting of the first floor of 127, Southgate Road, London, N., were the subject of a written agreement of tenancy dated December 17, 1949, between the applicant landlord, Mrs. Yetta Keats, and the respondent, the tenant, Lewis Sheldon, by which a tenancy was granted for a term of one year beginning on December 17, 1949, at the yearly rent of 169*l.* There was provision with regard to repairs, and the tenant agreed to use the premises for the purposes of tailoring only. The deed contained this declaration: "It is hereby "declared that no warranty is given in the granting of this agreement "that the premises will not attract a development charge or require "permission under any statutory instrument. The landlord will in "no circumstances indemnify the tenant against any charges, actions "or proceedings directly or indirectly arising out of statutory instruments". The significance of that passage is that under the Town and Country Planning Act, 1947, if a dwelling-house is turned into commercial premises, as would be the case if premises formerly a dwelling-house were turned into premises for tailoring operations, a development charge might become payable. The premises, no doubt, having been previously used as a dwelling-house, the landlord was protecting herself by saying that if a development charge became payable owing to the tenant's use of the premises for tailoring, she would not pay it and he must take his own precautions or make his own arrangements about that matter. That agreement was an agreement to use the premises not as a dwelling-house but for tailoring only, and, so long as the agreement stood, the tribunal had no jurisdiction whatever to interfere with the rent.

As soon as the tenant's reference of the tenancy to the tribunal was notified to the applicant, the landlord, her solicitors notified the tribunal that it had no jurisdiction, and that they were not going to take any part in the matter. When the tribunal sat, counsel for the landlord attended and very properly took this point.

The landlord did not attend to give evidence; why should she in face of the written agreement between the parties? The tribunal, which has no power to take evidence on oath, then proceeded to invest itself with the power of deciding whether this agreement was a genuine one or not. A more dangerous usurpation of power by one of these tribunals it is impossible to imagine. There is always the danger—which can well be understood from what may be called the human point of view—when new tribunals of this sort are set up, that they will consider that because they have power to act therefore they ought always to act. In this particular case they had no power to act at all.

The reserve chairman of the tribunal, who tells us that he is a barrister, stated as follows in his affidavit. He said that he presided at the hearing by the tribunal on March 17, 1950, of the reference made by the tenant under the Landlord and Tenant (Rent Control) Act, 1949, in respect of the premises in question. Before the hearing the deponent, in company with two other members of the tribunal, inspected the premises, the tenant being present. The landlord had been given notice of the inspection but did not attend.

At the hearing the landlord was represented by counsel, but did not attend, and no evidence was called on her behalf. The tenant attended, gave evidence, and was cross-examined by counsel for the landlord, who submitted that the tribunal had no jurisdiction. The tenant then completed his evidence.

The reasons for the decision of the tribunal that it had jurisdiction to entertain the reference were as follows: The evidence disclosed that the premises were let unfurnished to the tenant and that they were first let as a separate dwelling on a letting beginning after September 1, 1939. From the visual evidence of their inspection the tribunal was satisfied that the premises were in fact being used as a dwelling-house. It was therefore of opinion that prima facie the letting to the tenant was a contract to which the Act of 1949 applied.

Counsel for the landlord contended that the memorandum of agreement dated December 17, 1949, was a letting for business purposes only, and that the letting was not within the Act. The tribunal was informed that a writ had been issued against the tenant at the instance of the landlord but it was not informed that it had been served. No reference was made to the service of a notice under s. 146 of the Law of Property Act, 1925.

The tenant contended and gave evidence that the agreement did not contain the genuine conditions of the letting, which were that the premises should be let as a private dwelling-house. This evidence was challenged, but was not contradicted.

The tribunal was aware that extrinsic evidence could not be given to vary a written agreement, but it formed the view that the provision in question in the lease was a sham. The tribunal had regard to the dictum of Evershed, L.J., in *Wolfe* v. *Hogan* (1) beginning: "Again "I wish to make it quite plain, etc". and to paragraph 471 in Halsbury's Laws of England (2nd ed.), Vol. 7, at p. 341.

The attention of the tribunal was not directed to the decision of the Divisional Court in *Rex* v. *Fulham Rent Tribunal*; *Ex parte Littna* (2), or it would have adjourned the case. In fact no application for adjournment was made by either party.

The deponent had been informed by the solicitor to the Ministry of Health that in the proceedings taken by the landlord against the tenant above referred to the tenant was defending an action on the ground that in so far as the lease of December 17, 1949, purported to

(1) [1949] 2 K. B. 194, 203.

(2) [1947] W. N. 214.

restrict the use of the rooms to the purpose of tailoring only, the restriction was known and understood by the parties to have been inserted as a matter of form only, and, according to the landlord, because of the rent and rates, and that it was not to form part of the real agreement between them, and was not to be legally binding or enforceable.

If the tribunal formed the view that that provision was a sham, it formed it on unsworn evidence. That was not a matter for it to decide at all, and it should have said to the tenant, "We cannot enter "upon this case. If you say that this written agreement is not the "true agreement between you and the landlord or does not truly rep-"resent the bargain made, you must go to a court of equity and get "it rectified". Whether that matter would have been within the jurisdiction of the county court I do not for the moment inquire; perhaps it would only be within the jurisdiction of the High Court; but whatever court has the jurisdiction, this tribunal had no jurisdiction to proceed unless and until that agreement was found to be a sham or not properly and truly to contain the terms of the bargain made. The tribunal, however, without being able to take sworn evidence or have any pleadings before it, or, for all I know, without being able to understand the doctrines upon which the court of equity proceeds when it has to exercise this very delicate jurisdiction of rectifying written agreements, proceeded to rectify it itself in the sense that it held that the agreement did not represent the terms of the contract and that it was really an oral contract. It had no power to decide that question.

Then it is said that we ought to adjourn this application. With all respect, I do not understand why we should adjourn it or how we could do so. This order of the tribunal has been made without jurisdiction, and is one which can have many repercussions and many far-reaching effects. If an order has been made by an inferior court which has no jurisdiction to make it, it is the plain duty of this court, if the order is brought before it, to make an order of certiorari to have that order quashed.

The future course of this dispute is not a matter for this court. It may be that the tenant will satisfy the Chancery Division in some proceedings which have already been begun. Whether a claim for rectification has been made I do not know, but I assume that it has, but what the outcome of those proceedings will be we do not know. We do not know whether they will ever come to trial, or, if they do come to trial, what decision there will be. If the court rectifies the agreement in favour of the tenant, he may, if he wishes or is so advised, apply again to the tribunal, which may then have jurisdiction. But how we could allow this order to stand which the tribunal had no jurisdiction to make, I do not know. In my opinion, this is a clear case for certiorari, and the order of the tribunal will be quashed.

HUMPHREYS, J. I agree, and in particular I agree that this court would be acting quite contrary to all known principles if it adjourned an application to quash some order in respect of which it is admitted that the court which made it had no jurisdiction, in order that the parties might await a possible decision in some proceedings pending in another court. If there was no jurisdiction in the tribunal to make its order, I think that there is only one thing which this court can do, and that is to quash it on that ground.

I express no opinion as to what the position would have been if the tribunal, on being informed that proceedings were actually in esse for the purpose of rectifying the agreement, had themselves decided to adjourn the application.

MORRIS, J. I agree.

Order of certiorari.

Solicitors: *J. C. Fox, Gamble & Son; The Solicitor, Ministry of Health.*

S. C.

C. A.

1950
Dec. 11, 12.

Evershed, M.R., Jenkins, L.J., and Danckwerts, J.

TINSLEY *v.* DUDLEY.

[Plaint No. F. 126.]

Negligence—Public house—Yard and garage adjoining—Motor-bicycle left in covered yard without charge—Removal by unauthorized person—Liability of publican.

The plaintiff went to a public house (which, it was conceded, was not a common inn) for refreshment, and before entering left his motor-bicycle in a covered yard which formed part of the premises. The gates leading to the yard bore the name of the house followed by the words "covered yard and garage". There was no attendant to look after vehicles left in the yard, for the use of which no charge was made, nor did the plaintiff inform the publican that he had left his machine there. Later, on leaving the premises, the plaintiff discovered that the motor-bicycle had been stolen.

In an action for damages against the publican:—

Held, (1.) that, though the plaintiff was an invitee, the defendant was not in his capacity of invitor liable for the loss of the motor-bicycle, for, though an invitor, when the invitation extends to the goods as well as to the person of the invitee, is under a duty to protect not only the invitee but also his goods from damage due to defects in the premises, he is under no duty to protect the goods from the risk of theft by third parties.

(2.) That, as the motor-bicycle had not been delivered into the possession of the defendant, and as the defendant was unaware that it had been brought onto his premises, he had not become a bailee of it, and was therefore not liable as a bailee for its loss.

Scarborough v. *Cosgrove* [1905] 2 K. B. 805 and *Ultzen* v. *Nicols* [1894] 1 Q. B. 92 distinguished; *Ashby* v. *Tolhurst* [1937] 2 K. B. 242 considered.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

APPEAL from Judge Samuel, sitting at Whitchurch county court.

At 8.30 p.m. on the evening of August 20, 1949, the plaintiff arrived on his motor-bicycle at a public house called the Wheatsheaf, at Green End, Whitchurch, Shropshire, of which the defendant was tenant and licensee. Before entering the inn for a drink the plaintiff placed his motor-bicycle in a covered yard which formed part of the premises. Entrance to the yard was gained from the highway through double gates, capable of being closed and locked, which bore the words, painted in large letters, "Wheatsheaf: Covered Yard and Garage". No charge was made for leaving vehicles in the yard, nor was there any attendant or other person whose duty it was to look after vehicles.

Later the same evening the plaintiff left the inn to call upon a friend, leaving his motor-bicycle in the yard. On his return for another drink at about 10 p.m. he noted that it was still there; but when about to leave the premises finally at 10.20 p.m. he found that the machine was missing: it had in fact been stolen and was not recovered.

The plaintiff brought an action for damages against the defendant, claiming 130*l.* for loss of the machine. He admitted in evidence that he did not inform the defendant that he had left his motor-cycle in the yard.

The county court judge held that on the night in question the relationship between the parties was that of invitor and invitee: the words on the gate leading to the yard constituted an implied invitation to those who had business at the defendant's public house to leave vehicles in the yard while on the premises; and that the defendant had failed to exercise reasonable care of the motor-bicycle while it was in his keeping as invitor. In the circumstances it was not necessary to decide whether the defendant was liable by reason of the Innkeepers Liability Act, 1863. Judgment was entered for the plaintiff for the sum claimed. The defendant appealed.

On the appeal counsel for the plaintiff intimated that he felt unable to contest the defendant's submission that, since there was no accommodation for travellers for the night, the premises could not constitute an inn. The question whether the defendant incurred liability under the Act of 1863 therefore did not arise.

Stephen Chapman for the defendant. The distinction drawn between the duty owed to an invitee and that owed to a licensee has no application or relevance in the present case. That

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distinction only arises in cases concerning the duty owed by an occupier of dangerous premises to ensure the safety of persons who enter his premises. This duty of care has never been extended to cover cases where the subject-matter of the dispute was not an injury to the person but only the loss or damage of a chattel.

The decision in *De Yong* v. *Shenburn* (1) is of some significance. There the Court of Appeal held that a master was under no duty to prevent the loss of his servant's chattels. It is plain that in that case there existed also between the parties the relationship of invitor and invitee. There was no suggestion, however, either in the arguments or in the judgments that this relationship imported any liability to the master as invitor.

The relevant distinction in the present case is between the duty owed by a licensor to a licensee and that owed by a bailee to a bailor. If the defendant be a licensee quoad the motor-bicycle, he is not liable for its loss: see per Lord Greene, M.R., in *Ashby* v. *Tolhurst* (2).

For the defendant to be a bailee there must have been a delivery of the motor-bicycle into his custody or possession. From the evidence given in the county court it is plain that the relationship of bailee and bailor never arose between the parties, for the defendant had no knowledge that the plaintiff had left his motor-bicycle in the yard.

Ultzen v. *Nicols* (3) is distinguishable from the present case, for there there was evidence from which the court could infer that there had been a symbolic delivery of the coat into the possession of the restaurant proprietor. It is conceded that if the yard constituted a garage the defendant would be liable for the loss of vehicles left in it by persons visiting the public house; but it is submitted that the wording on the gates leading to the yard means no more than that a person visiting the public house is at liberty to park his car or other vehicle there while he is on the premises.

[He also referred to Salmond on the Law of Torts (10th ed.), p. 476.]

Nigel Bridge for the plaintiff. In the present case there was evidence on which the county court judge could legitimately find either that there was a bailment of the motor-bicycle to the defendant, or that it was to be inferred, by reason of the circumstances

(1) [1946] K. B. 227.
(2) [1937] 2 K. B. 242, 249.
(3) [1894] 1 Q. B. 92.

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in which the machine was left in the yard, that a special contract arose between the parties sufficient to impose a duty of care upon the defendant.

Ashby v. *Tolhurst* (4) is plainly distinguishable on its facts. There, the plaintiff was given a ticket which gave rise to a special contract excluding liability for loss on the part of the car-park proprietors by reason of the words contained on it. Further, in that case the car-park in question was on a piece of open ground: it was not an enclosed yard forming part of larger premises as here.

It is contended that a bailment may come into existence by reason of the bailee's using such words or conduct as to imply that all that is necessary to bring the bailment into operation is to accept the offer so expressed. Here, the wording on the gates constituted the offer and the plaintiff accepted it by placing his motor-bicycle in the yard, whereby there was a symbolic delivery of it into the defendant's possession.

Suppose that in *Ultzen* v. *Nicols* (5) the facts had been that the diner had deposited his coat in an unattended cloakroom which at its entrance bore words inviting him to leave articles there; the question whether or not a bailment arose in such circumstances would still have been one of fact to be decided by the judge. Similarly in the present case there was evidence on which the judge could so find.

In any event it is contended that the relationship between the parties imposed a duty of care upon the defendant. Although it is conceded that he is not an innkeeper, yet his position is analogous to that of a boarding-house keeper who is under a duty to take care of the goods of his guests which are brought to his premises: see *Scarborough* v. *Cosgrove* (6).

Chapman replied.

EVERSHED, M.R., stated the facts and continued:—In his pleadings and at the trial the plaintiff put his case on two alternative grounds. First, he alleged that the defendant was an innkeeper within the meaning of the Innkeepers Liability Act, 1863, and that as such he owed a duty to the plaintiff to look after the motor-bicycle and that he failed to perform that duty. It was alleged that the duty was owed to the plaintiff either as a traveller or otherwise. Secondly, and alternatively, if that head of claim could not be sustained, the plaintiff alleged that in the circumstances of this case there came into existence between the plaintiff and the defendant a contract whereby the defendant undertook to use reasonable care to look after the plaintiff's machine, and that he failed to perform that duty and is liable accordingly in negligence for the sum claimed.

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(4) [1937] 2 K. B. 242.

(5) [1894] 1 Q. B. 92.

(6) [1905] 2 K. B. 805.

Certain points have dropped out of the case. Thus Mr. Chapman conceded that if in truth his client were an innkeeper he would be liable to the plaintiff, whether because he was a traveller or otherwise. But Mr. Chapman has drawn our attention to such authority as there is on the true characteristics of an innkeeper, and Mr. Bridge has not felt able to address contrary arguments on that point. The reasoning which concludes this point in the defendant's favour is as follows: Mr. Chapman read as part of his argument certain passages from Jelf and Hurst on the Law of Innkeepers. According to that work it is of the essence of an innkeeper's function that he should afford relief and lodging to people travelling from place to place. Mr. Chapman also referred to one or two authorities, such as *Reg.* v. *Rymer* (7); *Sealey* v. *Tandy* (8), and an Irish case, *Reg.* v. *Armagh Justices* (9). Those cases, he contended, support the view that no one can be said to be an innkeeper unless he offers accommodation in the sense of lodging to persons who want to stay at his house. It is beyond dispute in this case that the Wheatsheaf Hotel offered no such accommodation. There was, I understand, one spare bedroom, but it was not furnished. There was therefore absent the characteristic which Mr. Chapman has contended is essential, namely, that there should be lodging available to persons who required it. In case, on any future occasion, it is necessary further to pursue the matter, it is desirable that I should say no more about it than that, on the arguments as presented and in view of Mr. Bridge's concession, I assume and hold that in this case the defendant was not an innkeeper and therefore that the first head of claim on which the plaintiff seeks to found himself cannot be sustained.

The result is that the determination of this appeal must depend on the second argument put forward by the plaintiff, namely, that there was a contract between the parties. Again we are assisted by Mr. Bridge's concession that, if there is to be a contract giving rise to liability on the defendant's part, there must have been some delivery to the defendant of the possession or custody of the motor-bicycle. Mr. Bridge's argument is that such a giving of possession or custody was found as a fact by the judge and that there is some evidence to support it.

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(7) (1877) 2 Q. B. D. 136.

(8) [1902] 1 K. B. 296.

(9) [1897] 2 I. R. 57.

That is the main point in the case but I will first dispose of a subsidiary argument of Mr. Bridge, founded on *Scarborough* v. *Cosgrove* (10). That case, which concerned a boarding-house keeper and not an innkeeper, affords, he says, an analogy which can be applied in this case to impose similar liability upon the defendant. I do not accept that argument, which I think confuses the special circumstances of a particular case with a matter of principle. There does not emerge from that case any valid ground for a claim for liability different from that to which I shall later refer. In *Scarborough* v. *Cosgrove* (10) the two plaintiffs, husband and wife, were lodgers at a boarding-house. The wife pointed out to the boarding-house keeper that she had with her jewellery, and she inquired about the locking of her bedroom or if there were some receptacle in the room in which the jewels could be safely stored. The boarding-house keeper, aware, therefore, of the existence of the valuables, explained that no separate key could be given, but assured the plaintiff that if the jewels were left in the room in the ordinary way, they would be quite safe. It is not surprising that on those facts the court found that there was a special contract whereby the defendant, the boarding-house keeper, promised to use reasonable care to look after the jewels. The jewels having been lost, it was held that there had been a breach of duty involved in the defendant's promise, and that he was liable accordingly.

Unlike the present case that case concerned personal belongings of the person staying in the boarding-house, and, still more significant, their existence was disclosed to the defendant in the action, who in turn made representations to the plaintiff in regard to them. Romer, L.J., in the following passage stated the matter clearly (11): "One thing is clear—namely, that the "liability of the landlord of the boarding-house in respect of the "luggage is not co-extensive with the liability of an ordinary "innkeeper, but what the extent of the liability is remains to be "considered. It appears to me that, before that can be ascer- "tained, it is necessary, at any rate to a certain extent, to inquire "into the particular circumstances of each case. It may be that

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(10) [1905] 2 K. B. 805.

(11) Ibid. 814.

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" some of the luggage has been committed temporarily, or during " the stay of the lodger, into the sole custody of the landlord. " In that case, clearly, there would be a duty on the part of the " landlord to take reasonable care of it. On the other hand, " there may be cases where, by arrangement between the parties, " the guest has taken upon himself solely the care of his luggage, " and in those cases, whatever may be the duties of the landlord " towards his guest, they could not be treated as based on the " footing that in any sense he had the custody or partial custody " of the luggage. The difficulty as to the law arises in cases like " the present, which are intermediate between the two I have " just mentioned, and where the luggage cannot be said to be in " the sole custody of either the landlord or the guest ". That passage emphasizes the important point which I think vital to this case; that the decision must depend on discovering in whose hands was the custody of the article in question.

The county court judge in his judgment said: " I came to the " conclusion that on the night in question the relationship " between the parties was that of invitee and invitor. It was " admitted by the defendant's advocate that as far as the " plaintiff personally was concerned he was an invitee whilst " purchasing and consuming alcoholic liquor on the premises, but " he was only a licensee for the purpose of taking and leaving his " motor-cycle in the defendant's yard. I cannot draw that " distinction. The yard in question forms part of the whole " premises. On the door of the yard, as is shown by the photo-" graph, is painted in big letters 'Stabling and Garage' "—in fact the wording was " Covered Yard and Garage "—" in my " view, the said words constitute at least an implied invitation " to those who have business at the defendant's inn that they " may leave any vehicle therein whilst on the said premises. " Whilst the said motor-cycle was there on August 20, 1949, " and whilst the plaintiff was on the premises consuming " his liquor, the said motor-cycle was taken away by some " unauthorized person and it has not been recovered by the " plaintiff. In my view, the defendant failed to exercise reason-" able care of the said motor-cycle whilst it was in his keeping " as aforesaid ".

It is on those last few words that naturally and properly Mr. Bridge has fastened, for he says that that is a finding that the relationship which existed in the circumstances of the case on the evening of August 20 was such that the bicycle was in the keeping of the defendant publican. I am unable to accept that submission. I cannot escape the conclusion that the foundation of that particular finding on the part of the judge lay in the assumption that the relationship between the plaintiff and the defendant was that of invitee and invitor as distinct from that of licensee and licensor. In so far as he based himself on that distinction, I think that the judge misdirected himself. I think that he assumed, wrongly, that if, as might well have been the proper inference, the plaintiff was an invitee, it followed that there was a delivery over of custody or possession of the motor-bicycle to the defendant as invitor. Therein, to my mind, lies the fallacy in the judgment.

The question whether the relationship of one person to another in respect of premises is that of licensor and licensee or invitor and invitee has often been before the courts; but the validity of the distinction bears only, I think, on matters of personal injury or, at most, material injury which is incidental or ancillary to personal injury. The basis of liability in the case of an invitee is too well known to require long citation. Willes, J., in *Indermaur* v. *Dames* (12) stated that an invitee on premises is entitled to expect that their occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know. But the damage which is there referred to is seen, on examination of the authorities, to be damage to the person rather than to the goods of the invitee, save to the extent that such material damage may be purely ancillary to personal injury. There is no authority for the view that an invitee has, quoad his belongings, such as a motor car or motor-bicycle, some higher right as against the invitor than has a licensee against a licensor. Indeed, such a view could not rest upon any intelligible principle. For, as Mr. Bridge has rightly conceded, the liability of the defendant here depends upon possession or custody; and I cannot see that the distinction between licensee on the one hand and invitee on the other can of itself bear upon or be relevant to the question, whether there existed some sort of bailment.

The case which Mr. Chapman made the foundation of his argument was *Ashby* v. *Tolhurst* (13). Having regard again to the concession which Mr. Bridge has properly made, I do not propose to discuss that case at length. The plaintiff had left his motor car on a car park, and the general question raised was the

(12) (1866) L. R. 1 C. P. 274.

(13) [1937] 2 K. B. 242.

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position of one who places his car in a car park. The plaintiff there was given a ticket, and much turned on its effect. But, apart altogether from that point, it seems quite plain that the decision in this court proceeded upon the view that one who parks his car in a car park does not thereby deliver over the possession or custody of the motor car to the keeper of the park—at any rate in the absence of some unusual or special circumstances which did not exist in that case and were not to be imported by the giving or the terms of the ticket.

Mr. Chapman particularly relied on this passage in the judgment of the Master of the Rolls (14): "It seems to me that reading the document as a whole, including its own description of itself, namely, 'Car park ticket', it really means no more than this: the holder of this ticket is entitled to park his car in the Seaway Car Park, but this does not mean that the proprietors are going to be responsible for it. If that be the true construction of the document, and I think it is, the argument that the presence of these exempting conditions points to the view that they are inserted in order to remove a contractual liability which would otherwise be there disappears and, in my opinion, the argument, when applied to a document of this kind, is of no real weight. If that be the true view, the relationship was a relationship of licensor and licensee alone, and that relationship in itself would carry no obligations on the part of the licensor towards the licensee in relation to the chattel left there no obligation to provide anybody to look after it, no liability for any negligent act of any person in the employment of the licensor who happened to be there".

No suggestion was made in that case of the possibility of the relationship being that of invitee and invitor, no doubt because it would have been quite beside the point. It may indeed be (if it were relevant to determine in which character the plaintiff was clothed) that he was in truth an invitee rather than a licensee. But the point is whether or not there was a contract whereby custody or possession of the car was handed over to the car park owner. The distinction, therefore, must, I think, be between licensee or invitee on the one hand and bailor on the other.

Ashby v. *Tolhurst* (15) is of some importance because it did lay down clearly that one who leaves his motor car in a car park cannot assume or assert against the car park proprietor any obligation to use reasonable care to look after the car. If, therefore, on the true view of the facts in this case, this yard or area, part of the Wheatsheaf premises, was really no more than a car park, the case is governed by *Ashby* v. *Tolhurst* (15). On the other hand, it is conceded that if I take my motor car to a garage, in the ordinary acceptation of that term, and leave it there, prima facie there will be a delivery over of possession or custody to the garage proprietor. Common experience is that in such a case there is an attendant on duty, and, a "garage", according to the Shorter Oxford Dictionary, is a place for the storage and refitting of motor cars.

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(14) [1937] 2 K. B. 242, 249. (15) Ibid. 242.

On the left of the entrance to the Wheatsheaf there is an archway or entrance to the yard in question. In the archway are double doors, bearing in large characters the legend "Wheat-"sheaf: Covered Yard and Garage". The doors are capable of being locked by padlock, and, though I do not myself attach great significance to the fact, along the top of the doors there is a series of spikes.

[His lordship reviewed the evidence, and continued:] It seems to me clear, therefore, that there is no basis for saying that there was any delivery over to the defendant, or to any agent of his, of the possession or custody of the motor-bicycle. There was nobody about, and it is not suggested that access to the yard was not available to any who liked to walk in.

Can the ordinary conclusion or inference which inevitably flows from the evidence be in any way affected by the nature of the invitation on the door, particularly by the use of the word "garage"? I have come to a clear conclusion that in this case it cannot. I think that the judge was quite right to say that the wording on the door was an invitation, and I should be content further, to accept the invitation as being what the judge stated, namely, an invitation to those who had business on the premises that they could leave any vehicle in the yard while there. That invitation seems to me to be no more than an invitation that there is a car park for the use of those who want to visit the public-house. The use of the word "garage" here was more eulogistic than accurate, and I do not think that it can be asserted that the wording on the door, together with the rest of the evidence, involved the result that there was here symbolically a delivery over of possession to the defendant licensee, or that, there being an invitation by the defendant which the plaintiff

(15) [1937] 2 K. B. 242.

accepted, the defendant could not be heard to say that he had not accepted custody of the motor-bicycle.

If that is right, the facts and the basis of the decision in such a case as *Ultzen* v. *Nicols* (16) cannot apply here. There the question was whether there had been a bailment of a coat. The county court judge had found as a fact that there had. It is plain from the judgment of the Divisional Court that both judges felt grave doubt about the propriety of the finding. Charles, J., thought that there was evidence to support it and therefore that the Divisional Court could not interfere. Wright, J., disposed of the matter more briefly by saying that the point that there was no bailment had not been taken in the county court and so was not available with the result that the finding as to bailment must be assumed to be correct. But when one examines the facts, it seems clear that there was some evidence to support the finding, for there was a manual delivery of the coat to some servant of the restaurateur, a waiter, who took it and hung it on a peg. Nothing like that delivery over of possession, actual or symbolical, occurred in this case, and therefore I think that there was no evidence here which can be said to support the view that there had been a transfer of possession. If that is so, the defendant must succeed.

I have thought anxiously whether, since the judge never has, I think, really applied his mind to the true question, it would be right to send the case back for a new trial; but I have come to the conclusion that it would merely involve the parties in unnecessary expense. The judge's note is brief, but there has been no suggestion on Mr. Bridge's part that it is in any way inadequate or that any facts were stated or sworn to by the plaintiff which are not recorded in the note. As Romer, L.J., said in *Scarborough* v. *Cosgrove* (17), all these cases must depend upon their own facts; and it should not be assumed that in every case in which, adjoining a public house there is a place provided for the leaving or storage of motor cars by patrons of the house it will follow that the publican is under no liability. That question will depend on whether, in the particular case, a contract of bailment comes into existence or not. In this case I think, for the reasons which I have stated, it would not be right to involve the parties in a new trial, for I think that it is quite clear on the evidence that no such contract was made. It was for the plaintiff to prove his case, and I think that he has failed to do so. One cannot help feeling sympathy for the plaintiff, who, being quite innocent, loses his motor-cycle; but there is something to be said for the view that where, as here, the question is upon which of two quite innocent persons a loss should fall, the loss may be left where it has fallen. However that may be, I am clear, upon an examination of this case, that there was no evidence to support a delivery of possession or custody of this machine to the defendant. Therefore, there was no basis in fact for the judge's finding that the motor-bicycle was in the defendant's keeping. The appeal should be allowed and the action dismissed.

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(16) [1894] 1 Q. B. 92.

(17) [1905] 2 K. B. 805.

JENKINS, L.J. I agree. The county court judge found it unnecessary to determine whether the Wheatsheaf was an inn or the defendant an innkeeper within the common law meaning of those expressions. The facts as regards the establishment kept by the defendant at the Wheatsheaf were that he was the holder of an ordinary full licence for the sale of liquor for consumption on or off the premises. He served no meals, with the exception of pies on Saturdays and snacks on market and auction days; and he provided no accommodation in which guests could stay the night. On that evidence, Mr. Chapman submitted that the Wheatsheaf was not an inn, in the relevant sense, and he cited cases and references in textbooks tending to bear out that submission. Mr. Bridge felt unable to support the judgment on the ground that the Wheatsheaf was an inn, and he intimated that he felt that no useful purpose would be served, having regard to the nature of the evidence, in sending the case back for that issue to be resolved. Therefore, as my Lord has said, this appeal falls to be determined on the footing that the Wheatsheaf was not an inn and that the defendant was not an innkeeper in the common law sense.

In *Robins & Co.* v. *Gray* (18) there is this well-known passage at the beginning of the judgment of Lord Esher, M.R.: "The "duties, liabilities, and rights of innkeepers with respect to goods "brought to inns by guests are founded, not upon bailment, or "pledge, or contract, but upon the custom of the realm with "regard to innkeepers" (19). As this case falls to be determined on the footing that the Wheatsheaf is not an inn, I think that the contrast drawn in that passage is perhaps instructive. An innkeeper is under a special liability by virtue of the custom of the realm. In other cases the liability, if any, must be found in some bailment or pledge or contract. In this case I think that the relevant ground of liability would be bailment or contract, and I think that it can in effect be further narrowed down to bailment, as the contract must be one which amounts to a bailment in that there must be actual or constructive delivery of the chattel into the hands of the person who is said to be responsible for its safe custody.

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(18) [1895] 2 Q. B. 501.

(19) Ibid. 503.

The question therefore is whether, in the circumstances in which the plaintiff came to leave his motor-cycle in the yard of the Wheatsheaf in the present case, the defendant, as publican and occupier of that public house, is fixed with liability for the theft of the motor-cycle. [His lordship stated the facts and continued:] The county court judge held—in my view quite rightly—that the plaintiff was an invitee at the Wheatsheaf. He held further—and I think quite rightly—that, having regard to the notice written on the doors of the covered yard and garage, the invitation extended not only to the plaintiff himself, but also to his motor-cycle. I find nothing to quarrel with in that finding. In fact, the position was that the defendant, as the proprietor of the Wheatsheaf, extended a general invitation to customers to come to the Wheatsheaf and consume the liquor provided and, if they chose, while they were so doing, to leave any vehicle or cycle in or on which they came in the yard. But from that the county court judge reached the conclusion that the cycle passed into the keeping of the defendant and that he came under a duty to use reasonable care to see that it was not stolen. In my view, that conclusion was not supported by the finding that the relationship of invitor and invitee existed between the defendant and the plaintiff.

Mr. Bridge ingeniously argued that in the judge's judgment there is something amounting to a finding that, on the facts, a contract of bailment was to be inferred; and he said that there was some evidence to support that finding and that it ought not to be disturbed. But the effect of the whole of the evidence is simply as I have stated it, and it supports a case of invitor and invitee, and nothing more. Therefore, the judgment comes, as I think, to this: the judge, having found that the relationship of invitor and invitee existed, held that, by virtue of that relationship, the defendant became responsible for keeping the motor-cycle safe against theft and taking all reasonable precautions to that end.

In my opinion, that liability cannot, as a matter of law, be inferred from the relationship of invitor and invitee. As is well known, a distinction is drawn for certain purposes between mere licensees and invitees, invitees being a class of licensees who are not merely authorized to come on premises, but are expressly or by implication invited to do so. But the purpose for which that distinction has been drawn has been that of measuring the liability of the occupier of premises to persons coming upon them with respect to the safety of the premises in point of physical condition, and an invitor has been placed under a more stringent liability in that respect to his invitees than a mere licensor to his licensees. The distinction is one which, owing to the unsatisfactory results produced in certain cases and the difficulty in many instances of distinguishing or drawing the line between invitees and mere licensees, has not escaped criticism from time to time, but it is a well-established distinction in the field to which it applies, and the field to which it applies is the physical safety of the premises.

There is no warrant at all on the authorities, so far as I know, for holding that an invitor, where the invitation extends to the goods as well as the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods, not merely from physical dangers arising from defects in the premises, but from the risk of the goods being stolen by some third party. That implied liability, so far as I know, is one unknown to the law. It would be a liability of a most sweeping and comprehensive character and would have entered into a very great number of cases if it existed. It would by now be well established by the authorities. For example, in *De Yong* v. *Shenburn* (20), where an actor's property was stolen from the theatre in which he was rehearsing, a decision could have been reached on the very short ground that the actor was an invitee, that the invitation extended to the necessary properties which he had to bring with him for the purpose of his performance, and accordingly that the proprietor of the theatre or occupier of the theatre was, however, responsible to him for the safe custody of his goods. It was not even sought to argue the case on that ground, but an analogous course was taken, in that it was sought to extend the liability of an employer to his employee for the safety of the premises on which the employee is required to work to the safety from theft of the property brought by the employee into the place of employment. du Parcq, L.J., dismissed that contention on the ground that there was no warrant whatever for

(20) [1946] K. B. 227.

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extending the liability of the master for the physical safety of his servant to the safety of the goods of the servant from theft. I venture to think that if the case had been argued, as it might have been, on the basis of invitor and invitee, the extension sought to be made of the liability of the invitor to the safety of the invitee's goods from theft as well as his physical safety would have been equally shortly dismissed.

Therefore, I agree that, as my Lord has said, the defendant here can only be fixed with liability if the inference can properly be drawn from the circumstances that there was an actual or constructive delivery of the plaintiff's motor-cycle into his safe keeping. On the facts, it seems to me that clearly there was no such delivery, actual or constructive: there was no attendant in the yard to whom the motor-cycle could be handed over; the plaintiff never even told the defendant that he had left the cycle in the yard; the yard was one to which access could readily be had from the street by anyone; and there is nothing in the case whatsoever beyond the general invitation to customers, if so minded, to leave their vehicles or cycles in the yard, an invitation accepted by the plaintiff. In my judgment, those facts fall far short of what is required to show an actual or constructive delivery of the machine into the charge of the defendant. The onus which it is sought to place on persons in the situation of the defendant, and which would be placed upon them, as it seems to me, if the learned county court judge's judgment were correct, would be an enormously heavy and quite unreasonable one in the circumstances. It would place them under an obligation in effect to keep a yard such as the defendant's yard under constant watch by some attendant appointed for the purpose and probably, owing to the hours of duty involved, it would be necessary to have more than one of these people in order that the watch might be constantly kept. Nothing short of that, so far as I can see, would protect the proprietor of premises such as these. Where the special and peculiarly stringent liability imposed on innkeepers in the common law sense is not in question, an obligation of that onerous character is not lightly to be inferred; and in my judgment it would be quite wrong to infer it from a mere general invitation to customers of an hotel, if so minded, to leave their vehicles in the yard of the hotel, with nothing over and above that amounting either to a delivery of the vehicle or cycle into the charge of the proprietor of the premises or at least to some representation by the proprietor that, in the event of vehicles or cycles being left there, they would be safely kept.

For these reasons, in addition to those stated by my Lord, I agree that this appeal should be allowed.

DANCKWERTS, J. I am of the same opinion. The defendant clearly was not an innkeeper. Accordingly, the standard of liability of an innkeeper is only material for the purpose of comparison with the position of other persons. Such other persons have generally been regarded as subject to another and different standard of responsibility. The county court judge based his judgment on the finding that the plaintiff was an invitee rather than a licensee. Such a distinction is relevant to a claim in tort for injury to the person, but, as it seems to me, is not relevant to a claim for loss of goods. As regards his motor-cycle, it seems to me that the only invitation, if any, which the plaintiff received was to accept a licence to leave his motor-cycle in the yard. He never brought the presence of the motor-cycle there to the notice of the defendant or placed it in the care of the defendant or his servants.

It is unnecessary to go through the cases again, as they have already been referred to so fully. All the cases in which the owner of premises other than an innkeeper has been held to be liable for loss of property belonging to persons resorting to the premises appear to depend on a contractual acceptance of liability to take care of the property by virtue of a bailment or some element of deposit with the knowledge of the owner of the premises or his servants. That contractual element, it seems to me, did not exist in the present case. The plaintiff was no more than a licensee as regards the presence of his motor-cycle in the yard, and the defendant never assumed any obligation to take care of it or to prevent theft.

In my view, therefore, the defendant was under no liability to the plaintiff for the loss of the motor-cycle, and accordingly this appeal should be allowed.

Appeal allowed.

Solicitors: *Nash, Field & Co., for Garnett & Culey, Crewe; Jaques & Co., for Cyril Jones, Son & Williams, Wrexham.*

Affirmed. H.L. [1952] 1 All E.R. 501.

C. A.

1950
Nov. 30;
Dec. 1, 14.

Somervell,
Jenkins and
Birkett, L.JJ.

KEMSLEY *v.* FOOT AND OTHERS.

Defamation—Libel—Plea of fair comment—No facts stated in words complained of—Necessity for—R. S. C., Ord. 19, *r.* 27; *Ord.* 25, *r.* 4.

Criticism of a newspaper proprietor directed to the manner in which news is presented in papers controlled by him is to be treated on the same lines as criticism of a book or a play or other matter submitted to the judgment and taste of the public, and the critic is not to be shut out from the plea of fair comment because in his criticism he had not given or referred to examples of the conduct criticized, so long as the subject-matter of the comment is plainly stated.

Roos v. *Stent and Pretoria Printing Works Ld.* [1909] Transvaal Rep. 988 considered.

Where in the preliminary stages of an action a substantial point of law arises requiring to be argued objection should be taken on the pleadings and the point set down for argument in accordance with R. S. C., Ord. 25, r. 2. Applications under R. S. C., Ord. 25, r. 4, and Ord. 19, r. 27, for the striking out of any matter in a pleading on the grounds specified in the rules should be confined to plain and obvious cases. Thus an objection by a plaintiff that the defence of fair comment was not open to the defendant having regard to the nature of the libel complained of is a matter which should be raised under Ord. 25, r. 2, and not made the subject of an application under Ord. 19, r. 27, and Ord. 25, r. 4.

APPEAL from Parker, J., in chambers.

The plaintiff, in an action for libel, took out a summons under R. S. C., Ord. 19, r. 27, and Ord. 25, r. 4, applying to have struck out para. 5, and the further and better particulars delivered under it, of the defence of each of the defendants, on the ground that they were vexatious and contrary to the rules of pleading, tended to prejudice, embarrass and delay the fair trial of the action, and disclosed no reasonable defence and were frivolous. In para. 5 the defence of fair comment was pleaded.

By his statement of claim the plaintiff alleged that he was generally known to the public as a "newspaper proprietor". It was alleged that in the issue of the Tribune, a weekly periodical, of March 10, 1950, there appeared an article written by the first defendant headed "Lower than Kemsley". The rest of the article consisted of a criticism of an article as being "the foulest piece of journalism perpetrated in this country for "many a long year", in which on March 2, 1950, the Evening Standard made an attack on the Secretary of State for War, Mr.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

Strachey, under the heading "Fuchs and Strachey: A Great "New Crisis. War Minister has never disavowed Communism". The plaintiff had no connexion with the Evening Standard.

One Fuchs, said to be a Communist, had just been convicted and sentenced to a long term of imprisonment under s. 1 of the Official Secrets Act, 1911, for communicating information likely to be useful to an enemy. The innuendo of the attack in the Evening Standard was alleged in the article in the Tribune to be that the Secretary of State for War might be a Communist in the sense in which Fuchs was a Communist.

The plaintiff complained that the article in the Tribune under the heading set out above meant that his name was a byword as being a person who used his position as a director of newspaper companies to procure the publication of statements which he knew to be false.

On the hearing of the summons the master struck out two paragraphs of the particulars, and on that there was no appeal by the defendants; but he declined to strike out para. 5 of the defence and the remainder of the particulars. The plaintiff appealed to Parker, J., who ordered that para. 5 and the particulars under it should be struck out on the ground that no facts were stated about the plaintiff in the article complained of on which a defence of fair comment could be based.

The defendants, other than the printers, i.e., the editor, editorial board and Tribune Publications Ld., appealed.

The first two defendants appeared in person.

Gerald Gardiner, *K.C.*, and *H. J. Baxter* for the third and fourth defendants.

The case raises a substantial preliminary point of law. The plaintiff should not have invoked R. S. C., Ord. 19, r. 27, and Ord. 25, r. 4, but the question should have been raised as provided by Ord. 25, r. 2: see *Hubbuck & Sons Ld.* v. *Wilkinson, Heywood & Clark Ld.* (1); *Dyson* v. *Attorney-General* (2); *Worthington* v. *Belton* (3).

If it be objected that the particulars of defence delivered support only a plea of justification and not a plea of fair comment, reliance is placed on *Burton* v. *Board* (4). It is objected that the words complained of are incapable of being construed as a comment and are simply a statement of fact. It is often very difficult to determine whether the words be one or the other: see *Dakhyl* v. *Labouchere* (5); *Stopes* v. *Sutherland* (6). In any event this is a question to be decided before a jury at the trial.

(1) [1899] 1 Q. B. 86, 90.
(2) [1911] 1 K. B. 410, 414.
(3) (1902) 18 T. L. R. 438.
(4) [1929] 1 K. B. 301.
(5) [1908] 2 K. B. 325n.
(6) (1923) 39 T. L. R. 677, 679.

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Further, the plaintiff alleges that the defence of fair comment cannot be pleaded unless at least some of the facts on which the comment is based are contained in the article complained of; for, otherwise, it is said the reader cannot judge whether the comment be fair or not. This proposition, as stated, is too wide. It is not necessary to state the facts where the matter or matters commented on are of public interest and the facts are readily available to the public. This is so whether the comment relates to a book or a play; and it is so where the facts on which the comment is based are within the common knowledge of those to whom the comment is addressed: see *Strauss* v. *Francis* (7); *McQuire* v. *Western Morning News Co.* (8); *O'Brien* v. *Salisbury* (9). The same principle, it is submitted, applies to the conduct of a person engaged in public affairs, whether he be a politician or a proprietor of newspapers. On the authorities it is plain that not all of the facts on which the comment is need be stated: see *Aga Khan* v. *Times Publishing Co.* (10). And in *Lyons* v. *Financial News* (11) it was held that the defendants could rely on facts which were not expressly stated in the libel.

The plaintiff contends, however, that the principle enunciated above is confined to literary criticism and does not extend to the imputations of disgraceful motives to a person. He relies on a dictum of Fletcher Moulton, L.J., in *Hunt* v. *Star Newspaper Co.* (12); but see per Buckley, L.J., in the same case (13). Further, he relies on a South African case which adopted and approved the passage in which Fletcher Moulton, L.J., states (14): "If the facts are stated separately and the comment appears as "an inference drawn from these facts, any injustice that it "might do will be to some extent negatived by the reader "seeing the grounds upon which the unfavourable inference "is based". In the South African case, *Roos* v. *Stent and Pretoria Printing Works Ld.* (15), Rose Innes, C.J., cited and approved this passage, and proceeded to extract a general principle from it. But it is submitted that the statement of Fletcher Moulton, L.J., quoted above, pertains to cases where the facts and the comment on them are inextricably intermingled; it has no application to the present case. If the principle be of general application then *McQuire* v. *Western Morning News Co.* (16) was wrongly decided, for the article complained of in that case contained no facts whatever on which the strictures of the play were based.

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(7) (1866) 4 F. & F. 939.
(8) [1903] 2 K. B. 100.
(9) (1889) 6 T. L. R. 133.
(10) [1924] 1 K. B. 675.
(11) (1909) 53 Sol. J. 671.
(12) [1908] 2 K. B. 309, 319.
(13) Ibid. 323.
(14) Ibid. 319.
(15) [1909] Transvaal Rep. 988.
(16) [1903] 2 K. B. 100.

In the American Restatement of the Law the volume on Torts (17) supports the principle for which the defendants contend and which, it is submitted, is in accordance with the authorities and is good law.

Sir Walter Monckton, K.C., Diplock, K.C., Roche and *Du Plessis* for the plaintiff. The words complained of are a naked comment, for nowhere is the plaintiff referred to in the article except in the heading. The plea of justification is open to the defendants but not a plea of fair comment, for it is impossible to judge from this comment whether it be fair or not: see per Fletcher Moulton, L.J., in *Hunt* v. *Star Newspaper Co.* (18); *Roos* v. *Stent and Pretoria Printing Works Ld.* (19).

The order asked for was made under R. S. C., Ord. 19, r. 27, and Ord. 25, r. 4. It is customary in libel proceedings to apply under both rules. The authorities cited by the defendants are cases pertaining to Ord. 25, r. 4, but the plaintiff is not here seeking to strike out the whole defence but merely to strike out a particular plea. The principle for which the defendants contend is, it is submitted, confined to literary criticism—for the book, play or work of art criticized is itself the *fact* to which the comment relates.

If the above contention is a correct statement of the law, then the making of the order was within Ord. 19, r. 27, for the plea and the particulars under it (a) were unnecessary as putting forward a matter which was not a live issue in the case; (b) were scandalous, since an attack on a person was introduced into a pleading which was not a live issue; and (c) tended to prejudice and delay the fair trial of the action. The court should not lightly interfere with the judge's power and discretion: as to which see *Knowles* v. *Roberts* (20).

[They also referred to *Digby* v. *Financial News Ld.* (21); *Aga Khan* v. *Times Publishing Co.* (22); Odgers on Libel and Slander (6th ed.), pp. 165, 166; Gatley on Libel and Slander (3rd ed.), p. 373.]

Gerald Gardiner, K.C., in reply, cited *London Corporation* v. *Horner* (23).

Cur. adv. vult.

December 14. The following judgments were read:—

SOMERVELL, L.J. This is an appeal on a summons by the plaintiff in a libel action, under R. S. C., Ord. 19, r. 27, and

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(17) Vol. 3, Chap. 25, para. 66.
(18) [1908] 2 K. B. 309, 319.
(19) [1909] Transvaal Rep. 988.
(20) (1888) 38 Ch. D. 263, 267, 270.
(21) [1907] 1 K. B. 502.
(22) [1924] 1 K. B. 675.
(23) (1914) 111 L. T. 512.

Ord. 25, r. 4, to strike out para. 5 of the defence of each of the defendants, which raised a plea of fair comment, and the particulars delivered thereunder, on the ground that they are vexatious and contrary to the rules of pleading and tend to prejudice, embarrass and delay the fair trial of the action, and disclose no reasonable defence and are frivolous. As will be seen, some of the words are taken from one rule and some from the other. Before us, Sir Walter Monckton for the plaintiff relied at any rate mainly on Ord. 19, r. 27. He submitted that the plea and particulars were unnecessary and therefore scandalous and tended to embarrass and delay the fair trial of the action.

The master struck out two paragraphs of the particulars, and with regard to those the defendants did not appeal. He declined to strike out para. 5 of the defence and the remainder of the particulars. The plaintiff appealed to Parker, J., who struck out the paragraph and the particulars under it.

The point raised can be indicated in outline. The plaintiff submits that for the defence of fair comment to be available, the facts, or at any rate some of the facts, on which the comment is a comment, must be contained or referred to in the alleged libel or in the article or document from which the words complained of are taken. A "bare comment" may be justified as true—that, of course, would be a question for the jury—but no plea of fair comment can be raised. He submits that the present libel falls within such a principle.

The defendants are not concerned to dispute that there may be subject-matters and circumstances in which such a principle is applicable. They dispute its applicability to the present case, in which, as will be seen, the alleged libel concerns the conduct of newspapers, and the honesty of their presentation of news with regard to political issues and personalities. They claim that in the circumstances of the case a plea of fair comment is open to them. The "facts" are, they submit, what I will call the plaintiff's newspapers. They admit their liability to give particulars of what they rely on in those newspapers as justifying their comment as fair.

The type of case appropriate for an application under these rules was considered in, among other cases, *London Corporation* v. *Horner* (24) and *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark Ld.* (25), a decision of this court. These cases are referred to in the Annual Practice under R. S. C., Ord. 25, r. 4, and Sir Walter Monckton at one time submitted that so strict a principle did not apply to Ord. 19, r. 27. An examination of the latter case makes it, I think, clear that, although the application, as

(24) 111 L. T. 512.

(25) [1899] 1 Q. B. 86.

here, was under both rules, it was Ord. 19, r. 27, which was substantially in question. The effect of the cases is accurately summarized in the Annual Practice, and I think applies to both rules. They should be applied only in plain and obvious cases, and if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under Ord. 25, r. 2. Mr. Gardiner relied on these cases, but he delivered a full argument on the merits, to which Sir Walter replied. The court must, of course, go into the merits to some extent to see whether the point is one for serious discussion. We all came to the conclusion that the point of law was one which required serious discussion and that the procedure under these rules was not appropriate. Both parties, however, desired us, if we felt able to reach a clear conclusion on the material before us, to treat the issue raised as one for our decision. The matter having reached this court and been fully argued, we propose to do so, though this must not be taken as a precedent justifying resort to these rules in other than plain cases.

The plaintiff, in para. 1 of the statement of claim, which is admitted, states that he is and is widely known to be a director of, and shareholder in, companies owning newspapers and generally known to the public as a "newspaper proprietor". He has no connexion with the Evening Standard. The first three defendants are editors, or on the editorial staff of a weekly newspaper called Tribune. The fourth defendant publishes, and the fifth, as I have said, is the printer and does not appear in this appeal.

The alleged libel was contained in an article in the Tribune of March 10, 1950. To understand the article it is necessary to state that one Fuchs, said to be a Communist, had just been convicted and sentenced to a long term of imprisonment under s. 1 of the Official Secrets Act for communicating information likely to be useful to an enemy. The Mr. Strachey referred to in the article was and is the Secretary of State for War. The article admittedly written by the first defendant and published by all is headed "Lower than Kemsley". In the statement of claim is added, in brackets, "meaning the plaintiff". Though this is not admitted in the defence, it was not disputed for the purpose of the argument before us.

The article is an attack on the Evening Standard for certain headlines coupling the name of the convicted Fuchs with that of the Secretary of State for War. These are the relevant extracts from the article: "The Prize for the foulest piece of journalism "perpetuated in this country for many a long year—and that is "certainly saying something—must go to Mr. Herbert Gunn, "editor of the Evening Standard, and all those associated with "him in the publication of the attack on John Strachey last "week. Since that newspaper has now sought to cover up its "original story with long and misleading disputations on the "matter, it is worth reprinting again the headlines which "appeared in the Evening Standard on Thursday, March 2. "Those headlines read as follows:—Fuchs and Strachey: A "Great New Crisis. War Minister has never disavowed Com-"munism. Now Involved in M.I.5 Inefficiency Probe. This "'great new crisis' was completely fabricated in the Evening "Standard office. . . . But it is obvious from these headlines "which we have reprinted what the Evening Standard was "suggesting. It was suggesting that Strachey might be a sup-"porter of Communism in the same sense in which Fuchs was "a Communist. Otherwise the conjunction of headlines had no "point at all. . . . We would have liked to have seen the decent "journalists who may be left in the other newspaper offices "demanding that their craven editors should speak a word in "the cause of honest journalism. . . . And any journalist worth "the name should consider his attitude to the disgraceful per-"versions, distortions, and innuendoes which some newspapers "sedulously purvey". That, I think, is sufficient to give the general nature of the article.

The innuendo pleaded in para. 4 of the statement of claim is as follows: "The words meant and were understood to mean "that the plaintiff was a person who used his position as a "director of newspaper companies to procure the publication of "statements he knew to be false and that his name was a by-"word in this respect, so that the best method of bringing home "to the readers of the article what was in the writer's view the "extreme dishonesty in this respect of the other persons referred "to in the article was to say that they were 'lower than the "'plaintiff'".

Of course, when the matter comes for trial, the plaintiff may or may not succeed in establishing the innuendo, but for the purpose of his present application it must be taken as what the words meant and were understood to mean. In other words, the comment is not completely in the air—such as a statement that "A. is unfit for human society", without any indication to the reader in the statement or in surrounding circumstances as to the nature of the acts which render him unfit.

The defendants in their defence, after matters to which I have referred, deny the innuendo and then in para. 5 plead as follows: "Further or in the alternative if and so far as the said "words refer to the plaintiff they are a fair comment made in "good faith and without malice upon a matter of public interest "—namely the control by the plaintiff of the newspapers (other "than the Evening Standard) referred to in para. 1 of the "statement of claim. Particulars of the specific facts upon which "the said words are a fair comment are delivered separately".

It is this paragraph which the learned judge has struck out. There was no argument before us on the particulars as such. If the judge was right, the particulars fall with the paragraph. If the paragraph stands, the particulars as left by the master's order stand so far as we are concerned. I should also add that the particulars as delivered with the defence were struck out as objectionable in form, and that the further and better particulars were delivered which are now before the court.

It was not disputed before us that the matters involved were of public interest. Although the so-called "rolled-up" plea in its various forms and the questions that have arisen as to particulars thereunder are comparatively modern, the plea of fair comment or fair criticism is, of course, of considerable antiquity. In *Carr* v. *Hood* (26) the plaintiff, an author, complained that he had been, as an author, immoderately ridiculed in a publication of the defendant's. Lord Ellenborough, in the course of his judgment, said (27): "We really must not cramp observations "upon authors and their works. . . . Reflection on personal "character is another thing. Show me an attack on the moral "character of the plaintiff, or any attack upon his character "*unconnected with his authorship*, and I shall be as ready as "any judge who ever sat here to protect him, but I cannot "hear of malice on account of turning his works into ridicule". The italics are mine.

In *Strauss* v. *Francis* (28), although after argument the proceedings were withdrawn, the court regarded the right of criticism as covering very violent words, which in the libel complained of were unsupported by quotations, or references to passages, or any general description of the book which was the subject-matter. It was said to be the worst attempt at a novel that had ever been perpetrated; it referred to its vulgarity, profanity, indelicacy, and its irrelevant abuse of great men living and dead. Of course at the trial the book or passages from it became relevant, or at any rate might have become relevant, in order to see whether this was criticism at all, or a malicious attempt to injure the author as a man as distinct from an honest criticism of his work. In one sense, of course, his character was attacked, but it was not an attack unconnected with his authorship.

A more modern case on which Mr. Gardiner relied was *McQuire* v. *Western Morning News Co.* (29). That case concerned a criticism of a play described as a musical absurdity,

(26) (1808) 1 Camp. 355n.
(27) Ibid. 357.
(28) (1866) 4 F. & F. 939.
(29) [1903] 2 K. B. 100.

comprised of nothing but nonsense; the songs were said to be common, not to say vulgar, and there were other highly critical statements. There was no citation from the play, no songs were quoted, nor was there any description of the play or its plot. There was nothing in the article to enable a reader to judge of the fairness of the comment. That could only be done by those who had seen the play, which had been presented for the first time the evening before the article. Like other criticism of works of literature or art on their first appearance, it was primarily addressed to those seeking guidance whether they should read the book or see the play or other work of art. The defence was that it was fair and bona fide criticism, that is, fair comment upon the play and its performance which were matters of public interest. The trial judge left the issue to the jury, who found for the plaintiff. This court entered judgment for the defendant. They held there was no evidence on which a rational verdict for the plaintiff could be founded.

These cases show that in criticizing something put before the public, as is a play or book, for its approval or disapproval, the defence is, or at any rate may be, open although there are no citations or examples by reference to which the reader can judge of the fairness of the comment. This is perhaps even more clearly applicable to works of art in the popular sense. A man can criticize paintings or sculpture without producing reproductions of the works criticized. The facts, Sir Walter Monckton submits, in such cases are sufficiently referred to and are available. This is true in one sense. But the object of the article in *McQuire's* case (30) was to discourage anyone from paying the price necessary to ascertain the facts. The facts were no doubt available to those prepared to pay for a seat and who could be accommodated during the run of the play. In considering whether a comment is a bare comment within Sir Walter Monckton's principle it is important to consider the subject-matter to which the comment is directed. It is obviously relevant that the subject-matter is, like a book, play or newspaper, something published, submitted to the public for approval or disapproval.

There is a different class of case, to which I will now refer, because it is relevant when I come to consider the case on which the plaintiff mainly relied. The act or acts of a public man, unlike a play after its first night, or a book just published, may be both undisputed and under such vigorous discussion at the moment that what might in form seem to be a bare comment might to any reader be plainly referable to that act or acts. I will take an example from the past. Many people regarded those who negotiated the Treaty of Utrecht as having betrayed their country. A bare comment on the loyalty of one of the negotiators might so obviously be understood as referring to the fact of the treaty and the negotiator's part in it that I would hesitate to say that the writer would be shut out from the plea of fair comment although there was no express reference to the treaty. At the other end of the scale one may imagine a comment reflecting on the integrity of a subordinate official, whose activities had so far received no publicity, where it might be held that the defence was not available unless the facts relied on were substantially set out or indicated.

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(30) [1903] 2 K. B. 100.

I will now refer to the case on which Sir Walter Monckton relied: *Roos* v. *Stent and Pretoria Printing Works Ld.* (31). Roman Dutch law had adopted our law as to fair comment, and the careful judgments in that case are based on the English authorities and in particular on what is admittedly a dictum of Fletcher Moulton, L.J., in *Hunt* v. *Star Newspaper Co.* (32). Passages from the judgments are quoted in English textbooks and they deserve, if I may say so, serious consideration.

It is necessary shortly to set out the facts. In 1898 the Government of the then South African Republic had given financial assistance to the formation of a cold storage company, known as the Koelkamers Company. Three of the directors were to be appointed by the Government and three elected by the shareholders. Later, another storage company, the Imperial, succeeded in acquiring a majority of the shares and was therefore in a position to elect the three elected directors. In 1908, violent attacks which became widely known, were made by a Mr. Gillingham, a shareholder, against the elected directors of Koelkamers. He called them thieves and swindlers, accused them of producing false balance sheets, and so on. The suggestion, of course, was that they had the Imperial Company's interests in mind and not those of Koelkamers. The Attorney-General refused to prosecute the directors, nor was Mr. Gillingham prosecuted. Civil proceedings, as Rose Innes, C.J., says, were out of the question as Gillingham was insolvent. The plaintiff was one of the directors at the time. The article containing the libel appeared shortly after. It dealt with the high price of meat in Pretoria, where Koelkamers operated. The last sentence ran as follows: "Here is an opportunity for the Koelkamers to do something in "the public interest and to show that at the present moment, at "any rate, the company is being honestly run for the benefit of "its own shareholders". The defendants admitted that the words were an attack on the directors in the past, of whom the plaintiff was one, and meant that these directors had had regard to the interests of the Imperial Company rather than Koelkamers. The court held that the words were defamatory.

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(31) [1909] Transvaal Rep. 988.

(32) [1908] 2 K. B. 309.

The question then arose with which we are concerned: could the defendants plead fair comment? Rose Innes, C.J., who delivered the first judgment, held that no reference to any of Mr. Gillingham's specific charges could fairly be deduced from the words used by the writer of the article. This is, I think, all-important. I am not concerned with whether I should have come to the same conclusion. It may well be that Mr. Gillingham's accusations were so violent and vague that they could not be treated as "facts" on which anyone was entitled to comment. The fact that Rose Innes, C.J., so held indicates to my mind that his decision might have been different if, for example, Mr. Gillingham had made one specific charge to which any normal reader would have regarded the comment as directed.

In considering the nature of the defence Rose Innes, C.J., said (33): "It must be clear to those who read it what the facts "are and what comments are made upon them. And for two "reasons. Because it is impossible to know whether the com-"ments are fair unless we know what the facts are: and because "the public must have an opportunity of judging of the value of "the comments". He then cited the passage from Fletcher Moulton, L.J., in *Hunt* v. *Star Newspaper Co.* (34). The sentence particularly relied on is the sentence: "If the facts are "stated separately and the comment appears as an inference "drawn from those facts, any injustice that it might do will be "to some extent negatived by *the reader*" [my italics] "seeing "the grounds upon which the unfavourable inference is based". Fletcher Moulton, L.J., was referring to cases where comment and fact are intermingled in the words complained of, but Rose Innes, C.J., extracted a general principle, whether it be right or wrong, from that sentence.

It seems to me plain, and *McQuire's* case (*supra*) shows it, that there are many cases where the *reader* cannot judge *from what he reads* whether the comment is fair or not. Rose Innes, C.J., later disclaims the view that all the facts must be set out, but he says that there must be some reference in the article which clearly indicates what facts are being commented on. Smith, J., put it in this way (35): "Can the defence of fair "comment be successful in a case in which none of the facts "upon which the comment is founded appears in the article "itself?" He added: "I think there may be cases where the "facts are so notorious that they may be incorporated by refer-"ence". It was decided that no facts were indicated or referred to. The comment was "in the air" and the plea of fair comment was not available. The defendant could have justified but he had not sought to do this.

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(33) [1909] Transvaal Rep. 988.

(34) [1908] 2 K. B. 309, 319.

(35) [1909] Transvaal Rep. 988, 1009.

I am not suggesting that that decision on its facts and in the circumstances as found, applying English law, was wrong. But in considering the general statements made it is important to bear in mind that the subject-matter was the honesty of a director. It was not a play, book, newspaper or exhibited work of art, something put before the public, although it was a matter of public interest and the public had known of Gillingham's violent accusations. I think that Smith, J.'s reference to cases where the facts are notorious clearly shows that. It is, however, an abuse of language to say that when a book is just published or after the first night of a play the facts on which the comment is based are notorious, and yet there is no need to set out or specifically refer to passages. All that is necessary is a "reference" to the play. The general statements in that case to which I have referred, if regarded as applicable generally, and in particular to comments on published matter, are not, in my view, an accurate statement of our law.

I think that *Burton* v. *Board* (36) assists the defendants' submission. The libel complained of was in letters to a newspaper. Fair comment was pleaded and the defendant gave particulars setting out the facts on which he was commenting. He specified a number of letters which the plaintiff had written to the same paper. It seems clear that these had not been specified in the defendant's letters or it would have been unnecessary to specify them in the particulars. The issue was whether the defendant could do this without justifying the words in the ordinary sense. It was held that he could. Horridge, J., had struck out a number of the particulars as embarrassing, but this court restored them and held that the defendant could plead fair comment without justifying.

Criticism of those alleged to be responsible for the conduct of a newspaper directed to the manner in which that newspaper presents news seems to me, prima facie, to be dealt with on the same lines as criticism of a book. To say, of the author of a book written, for example, on one side or the other in party politics, that the author in his book dishonestly presented his case would seem to me to fall within the cases to which I have referred: the writer would not be shut out from the plea of fair comment because he had not given or referred to examples in his criticism. The only difference which I can see is that in criticizing the general manner in which newspapers are conducted, the comment, if fair, must be based on a great deal of material over a

(36) [1929] 1 K. B. 301.

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considerable period of time. This, if anything, might seem to assist the defendants' argument. To give the whole material would be impossible. To give two or three examples might be misleading in this sense: no newspaper proprietor can see and approve everything that appears in all his papers. There might be circumstances attaching to the examples selected which would acquit the proprietor of all personal responsibility, whereas if the whole material were available the comment might be regarded as fair.

I am not saying that if a comment gave no indication of the nature of the class of facts to which it was directed—for example, "the Daily X is a disgraceful paper"—the principle contended for by Sir Walter Monckton might not apply: it would depend on the circumstances. But here the general nature of the comment is indicated and for our purposes can be taken to be as stated in the innuendo.

I have therefore come to the conclusion that the judge applied a wrong principle and that the appeal should be allowed.

JENKINS, L.J. I agree that the appeal should be allowed, and for the reasons stated in the judgment just delivered and also in the judgment about to be delivered by Birkett, L.J., which I have had the opportunity of reading. I concur entirely in those judgments, and find nothing that I can usefully add.

BIRKETT, L.J. In this appeal the question is whether the defendants are to be allowed to plead the defence of fair comment in an action for libel brought by the plaintiff against them. On October 12 Parker, J., decided that they could not do so, and ordered para. 5 of the defence and the particulars thereunder, which raised the defence of fair comment, to be struck out. A summons had been taken out before the master on July 15 asking for para. 5 of the defence and the particulars to be struck out under R. S. C., Ord. 19, r. 27, and Ord. 25, r. 4; and, on his refusal to strike out the paragraph, though he made some amendment of the particulars, appeal was made to Parker, J., with the result which I have stated.

The present appeal, therefore, raises, as I think, questions of very great importance. The defence of fair comment is now recognized to be one of the most valuable parts of the law of libel and slander. It is an essential part of the greater right of free speech. It is the right of every man to comment freely, fairly and honestly on any matter of public interest, and this is not a privilege which belongs to particular persons in particular circumstances. It matters not whether the comments are made to the few or to the many, whether they are made by a powerful newspaper or by an individual, whether they are written or spoken: the defence that the words are fair comment on a matter of public interest is open to all. When defendants who wish to rely upon this defence are deprived of it, the importance of the matter is manifest to all; and the character of the defence, as I have just summarized it, is not without importance in the consideration of the facts in the present appeal.

It is now very well established that this defence of fair comment has a wide application. In *Merivale* v. *Carson* (37) Lord Esher, M.R., made this plain in what is now a celebrated passage: "Every latitude must be given to opinion and to "prejudice, and then an ordinary set of men with ordinary "judgment must say whether any fair man would have made "such a comment . . . mere exaggeration, or even gross "exaggeration, would not make the comment unfair. However "wrong the opinion expressed may be in point of truth, or "however prejudiced the writer, it may still be within the "prescribed limit. The question which the jury must consider "is this: would any fair man, however prejudiced he may be, "however exaggerated or obstinate his views, have said that "which this criticism has said?"

In *Hunt* v. *Star Newspaper Co.* (38) Fletcher Moulton, L.J., said that those observations of Lord Esher, M.R., were to be applied to literary criticism, but not to the imputation of motives to an individual. This was not the point on which the decision in that case turned, and neither the Master of the Rolls nor Buckley, L.J., said anything to support that view. Indeed, Buckley, L.J., said the exact opposite (39): "The defence of "fair comment extends to the imputations of motive". He also said (40): "Whether the criticism be upon a literary production "or the conduct of a public man, it is for the jury I think to "find whether the imputation based upon facts truly stated does "or does not honestly represent the opinion of the person who "gives expression to it and was not without foundation".

Sir Walter Monckton, in his argument for the plaintiff, relied on those words, "facts truly stated", as supporting the view that some facts, at least, must be stated. I will consider the argument at a little greater length in a few moments, but I will say here that these words which appear in many judgments of the courts do not, I think, help to decide the question which is before us now. In my opinion these words apply to every defence of fair comment, however pleaded, and were intended to mean what is now universally accepted that, if a comment is made on facts, the facts, however ascertained, must be true facts. To falsify or distort facts and then to comment on them as though they were true facts would mean that the comment could not possibly be fair, and the defence of fair comment would have no application. The only exception to this rule would be where the facts were as stated by Phillimore, J., in *Mangena* v. *Wright* (41). These words of Crompton, J., in *Campbell* v. *Spottiswoode* (42) are not without their bearing on the questions to be determined in this appeal: " Nothing is more important " than that fair and full latitude of discussion should be allowed " to writers upon *any public matter*, whether it be the conduct " of public men or the proceedings in Courts of Justice or in " Parliament, or the publication of a scheme or a literary work. " But it is always to be left *to a jury* to say whether the publication has gone beyond the limits of a fair comment on the " *subject-matter discussed.* A writer is not allowed to overstep " these limits ". It cannot be doubted, I think, that the conduct of a newspaper is a public matter, and that the final judgment on fairness or unfairness is to be given by a jury on the subject-matter discussed, that is, the conduct of the newspaper.

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(37) (1880) 20 Q. B. D. 275, 280, 281.

(38) [1908] 2 K. B. 309, 318, 319.

(39) Ibid. 323.

(40) Ibid. 324.

There are various forms in which the plea of fair comment may be pleaded. In the case before us, the defence in para. 5, which has been struck out, reads: " Further or in the alternative " if and so far as the said words refer to the plaintiff they are a " fair comment made in good faith and without malice upon a " matter of public interest—namely the control by the plaintiff " of the newspapers (other than the Evening Standard) referred " to in para. 1 of the statement of claim. Particulars of the " specific facts upon which the said words are a fair comment " are delivered separately ". If the plea is made in this form, or in what is called the " rolled-up plea ", but without stating that the comments are made on " the said facts ", particulars must be given of the matters of public interest on which the comment is based if they are not given in the pleading, and the defendant is entitled to deliver particulars of the facts on which he based his comments.

In *Aga Khan* v. *The Times Publishing Co.* (43), Scrutton, L.J., said: " Where the comment is alleged generally to be ' on " ' a matter of public interest ' particulars are, as far as I know, " always ordered, in order that it may be seen what facts beyond " those stated in the libel the defendant intends to rely on ".

It is clear, therefore, and indeed it was not contended otherwise, that ALL the facts need not be stated, but when the matter is submitted to the judgment of a jury particulars of the facts relied on must be supplied.

(41) [1909] 2 K. B. 958.
(42) (1863) 3 B. & S. 769, 778.
(43) [1924] 1 K. B. 675, 682, 683.

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In my opinion, the form of the pleadings in this case is of the utmost importance in coming to any conclusions on the various submissions made before us. The plaintiff in para. 1 of the statement of claim had said: "The plaintiff is and is widely "known to be a director of and shareholder in companies owning "newspapers and is generally known to the public as a 'news-"'paper proprietor'"; and in para. 3 of the statement of claim had set out in full the article in the Tribune of March 10, 1950, which was the libel alleged. The only words which referred directly to the plaintiff were contained in the heading of the article "Lower than Kemsley". The remainder of the article referred to what was called "the foulest piece of journalism "perpetuated in this country for many a long year" by the editor of the Evening Standard and those associated with him. (The word "perpetuated" was perhaps a misprint for the word "perpetrated", but the word "perpetuated" is the word there).

Para. 4 of the statement of claim set out the innuendo: "The "said words meant and were understood to mean that the "plaintiff was a person who used his position as a director of "newspaper companies to procure the publication of statements "he knew to be false and that his name was a by-word in this "respect, so that the best method of bringing home to the readers "of the article what was in the writer's view the extreme dis-"honesty in this respect of the other persons referred to in the "article was to say that they were 'lower than the plaintiff'".

At this stage of the action, whatever may be the position at the trial, the form of the innuendo put on the words by the plaintiff himself seems to me to be of cardinal importance. The plaintiff is alleging that the comment is dealing with his position as a director of newspaper companies, and the way in which he used that position to procure the publication of false news, and that in this respect his name was a by-word. The plaintiff is there saying in the pleading that the matters commented on are matters of public notoriety, and that the ordinary reader would understand from the words complained of that what was being commented on was the conduct of the plaintiff in the conduct of the newspapers with which he was connected.

It was conceded in this case that the words "Lower than "Kemsley" were capable of being construed as comment, but it was argued before the master and before Parker, J., and before us, that the defence of fair comment was not open to the defendants because none of the facts on which the comment was based were contained in the article complained of, neither were they specifically referred to. Sir Walter Monckton, in addition to the submission already referred to, argued that the words "Lower "than Kemsley", being the only words which referred to the plaintiff, must be taken to be what he called "a naked

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"comment", and while the defence of justification was open to the defendants, the defence of "fair comment" was not; and the naked comment in the special circumstances of this case must be treated as though it were statement of fact. Before the defence of fair comment became applicable some facts must be stated or some specific reference made to them.

With the exception of the observations of Fletcher Moulton, L.J., in *Hunt* v. *Star Newspaper Co.* (44) there is no distinction to be drawn in the application of the defence of fair comment, whether the subject-matter of the comment be a newly published book, or the first night production of a stage play, or the presentation of a new cinematographic film, or the first performance of an orchestral work, or the conduct of a public newspaper, or anything which is submitted to the judgment and taste of the general public. They are all offered to the public as matters of public interest or concern and must, of course, be subject to public criticism. In the case of a newly published book, or the first night production of a stage play, or the exhibition of a new film, or the first performance of an orchestral work, the critic will usually make some reference to some of the facts on which his comment is based; but this is by no means true in every case. A critic might very well say: "In my opinion, this "book, or this play, or this film is an unworthy or indeed a "disgraceful production and ought not to receive any encourage-"ment from the public". No facts are stated in the criticism, none are specifically referred to; but nobody doubts that in such a case the critic could rely on the defence of fair comment if an action were brought. No doubt the facts on which he based his comment would have to be supplied, but at the time of publication the ordinary member of the public to whom the words were addressed would have no means of knowing there and then or of judging whether the comments were fair or unfair. He would know the subject-matter, that is the book, the play or the film, and the facts are in a sense available, for he can buy the book, or go to see the play or the film if he wishes so to do.

McQuire v. *Western Morning News Co.* (45) is a very good illustration. No facts were involved in a very damaging criticism of a newly produced play, and most certainly no reader of the criticism was in any position to judge of the fairness or otherwise of the comment, yet the defence of fair comment was set up, and though it failed in the court of first instance, it succeeded in the Court of Appeal.

If the defence of fair comment is open to a defendant in commenting on a book offered to the public when no facts are stated, it is difficult to see why a different rule should apply when the subject-matter is a public newspaper offered to the public. Sir Walter Monckton relied very strongly, of course, on *Roos* v. *Stent and Pretoria Printing Works Ld.* (46), and the headnote in that case lends strong support for his argument. Apart from the fact that the South African court placed great reliance on the passages from the judgment of Fletcher Moulton, L.J., in *Hunt* v. *Star Newspaper Co.* (47), and that the subject-matter was not a book or play or newspaper, the basis of the decision would appear to be that, as a matter of construction no facts could be incorporated by reference, and that it was therefore a "naked comment". Smith, J., seemed to say that if facts could have been so incorporated the decision might have been different. In any event, in view of the English authorities, I do not think that the South African case can be an authority for the general proposition that before the defence of fair comment is applicable the facts must be set out in the matter complained of so that the reader may judge of the fairness of the comment or otherwise.

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(44) [1908] 2 K. B. 309.

(45) [1903] 2 K. B. 100.

I do not think it is possible to lay down any rule of universal application. If, for example, a defamatory statement is made about a private individual who is quite unknown to the general public, and who has never taken any part in public affairs, and the statement takes the form of comment only and is capable of being construed as comment and no facts of any kind are given, while it is conceivable that the comment may be made on a matter of public interest, nevertheless the defence of fair comment might not be open to a defendant in that case. It is almost certain that a naked comment of that kind in those circumstances would be decided to be a question of fact and could be justified as such if that defence were pleaded. But if the matter is before the public, as in the case of a book, a play, a film, or a newspaper, then I think different considerations apply. Comment may then be made without setting out the facts on which the comment is based if the subject-matter of the comment is plainly stated. This seems to me to accord with good sense and the true public interest.

In the illustration given by Mr. Gardiner for the defendants: "This newspaper" (naming it) "does not represent the views of the public, and is not worthy to do so", it would not be practicable to set out the facts on which the comment was based. They might cover twenty years of the paper's history, and to set out one or two facts and ignore the others might distort the issue in a much more damaging way. But to say, in such a case that the commentator should be deprived of the critic's most valuable defence, fair comment, would be unjust to the defendant, and

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(46) [1909] Transvaal Rep. 989.

(47) [1908] 2 K. B. 309, 318, 319.

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injurious to the public interest, which is best served by free, frank and open discussion undeterred by the fear that the criticism would have to be justified in the fullest sense, and sustained by the knowledge that it will be enough to show that the comment was fair. "He is under no duty to prove that his "opinion coincides with that of a jury, but only that he was fair "and honest in expressing his view."

In the case before us the comment is made as a heading to an article which alleged that another newspaper unconnected with the plaintiff was guilty of lowering the standards of journalism, and thereby commented that the plaintiff was guilty of low standards of journalism too. The Kemsley newspapers, if I may use a convenient phrase, are public newspapers and to the knowledge of the public report news and conduct public controversy. The subject-matter of the comment is not in doubt; it is admittedly a public matter; and in those circumstances I cannot see how the case of a public newspaper can be different from that of a published book. The facts are not specifically referred to, but at this stage of the action I think the facts on which the comment is based must be taken to be the facts of the public newspapers controlled by the plaintiff and the conduct of the said newspapers. I think that the defence of fair comment can be raised and that the order of Parker, J., should be reversed.

In the Restatement of the Law, adopted and promulgated by the American Law Institute, it is of interest to observe that in the volume on Torts, chapter 25 (para. 606), concerning what is termed "privileged comment", it is laid down that defamatory criticism is "privileged" if the criticism is based on a true statement of the facts, or on facts otherwise known or available to the recipient as a member of the public, and to be "privileged "comment" under this rule, the facts upon which the opinion is based must be stated, or they must be known or readily available to the persons to whom the comment or criticism is addressed, as in the case of a newspaper criticism of a play or a review of a book.

It was said in the present case that the Tribune had repeatedly referred in previous issues to the question of the Kemsley Newspapers and that they had been the subject of much public discussion. For the purpose of my judgment I exclude this matter and prefer to deal with the question as though there had been no previous discussion. The decision to which I have come is supported, I think, by the decided cases. In *O'Brien* v. *Salisbury* (48) the Marquis of Salisbury made a speech in which he referred to a speech made by Mr. William O'Brien, M.P., at Ballyneale in September, 1888, and commented on it in the

(48) 6 T. L. R. 133.

severest terms. The defences set up in answer to the action which Mr. O'Brien brought for slander were justification and fair comment. The speech of Mr. O'Brien had been reported in The Times and had been the subject of comment in the House of Commons. Lord Salisbury commented on the speech as a matter of public notoriety and concern, and as a fair and bona fide comment on the speech and the matters to which it referred. Field, J., said (49): "It was surely of the very essence of the "defendant's case that he should be at liberty to prove if he "could that the persons taking unlet farms had been subjected "to the treatment which he had alleged, in order not only to "show that the allegation which he had made as to treatment "was true, but also that what he had said was in the nature of "comment upon facts to which he had referred, and which were "capable of proof. If he had not been permitted to prove those "facts they might have been taken as non-existent, and his "comments, therefore, baseless".

In *Lyons* v. *Financial News Ld.* (50) Fletcher Moulton, L.J., said: "In this case the particulars just stated the grounds on "which the defendants were going to say that the matter com"mented upon was a matter of public interest. The second set "of particulars were of the facts which were going to be relied "upon by the defendants, some of which were expressly stated "in the libel, some of which, though relevant to the matter of "the libel, were not expressly stated therein. The defendants "told the plaintiff that they were going to rely on all those facts "stated in the particulars to justify or to show that the comment "they made was fair. He doubted whether an order could have "been made on the defendants requiring them to give such "particulars as appeared in their statement of defence, but they "had put them forward, and his lordship was not satisfied that "they would embarrass the plaintiff at all. The order appealed "from would therefore be set aside and this appeal allowed".

The last quotation I desire to make is from Odgers on Libel and Slander (6th ed.) 166: "Sometimes, however, it is difficult "to distinguish an allegation of fact from an expression of "opinion. . . . If the defendant accurately states what some "public man has really done, and then asserts that 'such conduct "'is disgraceful', this is merely the expression of his opinion, "his comment on the plaintiff's conduct. So, if without setting "it out he identifies the conduct on which he comments by a "clear reference".

There is, of course, the further matter which, in my view, is decisive in the proceedings before us. The application to the master and to Parker, J., was made, as is customary, on the

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(49) 6 T. L. R. 137.

(50) (1909) 53 Sol. J. 671, 672.

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two orders I have mentioned, though Sir Walter Monckton relied on Ord. 19, r. 27. It would, of course, have been possible to leave this matter until the trial of the action, though the objections to that course are overwhelming; and it would have been possible to invoke the provisions of Ord. 25, r. 2. I am clearly of the opinion that the procedure under Ord. 19, r. 27, was quite inappropriate to the facts of this case, and I think Parker, J., was wrong in applying it.

For all these reasons I think that this appeal should be allowed.

Appeal allowed.

Solicitors: *Hale, Ringrose & Morrow; Theodore Goddard & Co.*

1950
Dec. 12.

Lord Goddard, C.J., Hilbery and Parker, JJ.

REX *v.* BIRMINGHAM (WEST) RENT TRIBUNAL. *Ex parte* EDGBASTON INVESTMENT TRUST LD.

Landlord and tenant—Rent tribunal—Premium—Payment of money to builder, not landlord, as condition of grant of lease—Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 *Geo.* 6, *c.* 40), *ss.* 1, 2, 18; *Sched. I, Part 1.*

On the true construction of the relevant provisions of the Act of 1949 the word "premium" refers to a payment made by the tenant to a landlord and not to some third person; and the word is not apt to cover a payment to a third party even though made in pursuance of an agreement to which he, the tenant and the landlord are all parties.

Landlords proposed to convert certain buildings into flats. An agreement was accordingly entered into to which they, a company of builders, and prospective tenants were parties, by which the builders agreed to construct eighteen flats for 18,000*l.*, payable as to 9,000*l.* by the landlords, and as to the balance by the tenants, each of whom was to be liable for 500*l.* to be paid to the builders. The builders undertook to complete the flats as soon as possible, and the landlords undertook to grant, and each tenant to accept, a lease of a flat selected by him. Three tenants having accepted the offer of three flats on condition of their signing the agreement and so rendering themselves liable for 500*l.* each to the builders, the rent tribunal, on reference of the tenancies to them, found that the 500*l.* was a premium and made the orders under the Act of 1949 appropriate to such a finding.

Held, that the whole conception of a premium was a sum paid to the landlord, as a consideration for the grant of a lease; that, as

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[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

the builders, by virtue of the agreement, only looked to the landlords for half of the cost of the work of conversion and to the tenants for the other half, the sums paid by the tenants were in discharge of their liability to the builders and the consideration which supported those payments was not the grant of the lease but the work done by the builders, and none the less so because no grant of a lease would be made to the tenant unless he signed the agreement and thus assumed liability for the 500*l.*; and that, accordingly, the 500*l.* could not be regarded as a premium.

Secus, if the landlords by the agreement had made themselves liable to the builders for the whole 18,000*l.* and had then required the tenants to discharge a part of that liability as a condition of the grant of a tenancy.

APPLICATION for an order of certiorari.

In 1947 the applicants, Edgbaston Investment Trust Ld., acquired the freehold of six war-damaged houses in Hagley Road, Birmingham. The plan was conceived of converting the houses into flats, and in pursuance of that plan a company called Birmingham Builders Ld. came into the enterprise to assist in the conversion.

In the same year, an agreement was made between the applicants of the first part, the builders of the second part " and " the persons whose names, addresses and occupations or descrip- " tions are set out in the first schedule hereto (hereinafter called " ' the tenants ') ".

That agreement provided as follows:—" (1.) The landlords and " the tenants hereby agree with the builders that the builders " shall forthwith proceed to convert the six dwelling houses . . . " into a block of eighteen flats under the inspection and direction " and to the satisfaction of the surveyor for the time being of the " landlords for the sum of 18,000*l.* which shall be paid as to " 9,000*l.* part thereof by the landlords and as to the balance " of 9,000*l.* by the tenants who shall each be responsible for pay- " ment of 500*l.* only. (2.) The builders hereby agree that in " consideration of the said sum of 18,000*l.* to be paid to them in " manner aforesaid they will as soon as reasonably possible after " the date hereof complete the conversion of the said six " residences into eighteen flats fit for immediate occupation. " (3.) If the said buildings and works shall be completely finished " to the satisfaction of the said surveyor . . . the landlords shall " grant and each of the tenants shall accept and execute a " counterpart of a good and sufficient lease of one of the said flats " to each of the tenants with their appurtenances for the term of " fourteen years from September 29, 1948, at the yearly rent " specified in the first schedule hereto as applicable to the flat " selected by the tenant such rent to be paid clear of all " deductions ".

When the work of conversion was almost at an end and most of the flats had been completed the three tenants who subsequently applied to the rent tribunal took tenancies on the terms that they signed and made themselves parties to the above agreement.

On their application to the rent tribunal, the tribunal decided that the 500*l.* which each tenant had paid to the builders was a premium prohibited by the Landlord and Tenant (Rent Control) Act, 1949 (1), and that they were therefore entitled to determine the rental equivalent of that premium and reduce the rent by the amount of the rental equivalent over a given number of years.

The landlords now applied for an order of certiorari on the ground that the moneys so paid by the tenants to the builders under the agreement was not within the mischief of the Act.

Dare for the applicant company.

R. J. Parker for the respondent rent tribunal.

LORD GODDARD, C.J., stated the facts and continued:—The whole question here depends on whether or not the Act of 1949 on its true construction has any application to the case where a sum of money is paid not to the landlord but to some other person. It is true, as Mr. Parker in his argument for the tribunal has pointed out, that the definition does not say that the expression " premium " includes a pecuniary consideration in addition to the rent paid to the landlord. But in our opinion this Act can only apply to premiums which are paid to the landlord. Section 18, sub-s. 2, does not define the term " premium ", it states only what it includes. It does in effect state that the term includes any pecuniary consideration in addition to rent, which is paid as consideration for the grant of a lease. In *King* v. *Earl Cadogan* (2)—a case in which Bray, J., gave a very useful judgment on the subject in the Divisional Court—the Court of Appeal pointed out that the word " premium " is a term of art. The whole conception of the term is a sum of money paid to a landlord as consideration for the grant of a lease.

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(1) The Landlord and Tenant (Rent Control) Act, 1949, s. 1, sub-s. 5: "In determining under this "section what rent is reasonable for "a dwelling-house, no regard shall "be had to the fact that any "premium has been paid in respect "of the grant, continuance or "renewal of a tenancy; but the pro- "visions of Part I of the First "Schedule to this Act shall have "effect in relation to such premiums "paid before the commencement of "this Act".

Section 2, sub-s. 1: "A person "shall not, as a condition of the "grant, renewal or continuance of "a tenancy to which this section "applies, require the payment of any "premium in addition to the rent ". . .". Sub-s. 5: "Where, under "an agreement made after the "twenty-fifth day of March, 1949, "any premium has been paid which, "or the whole of which, could not "lawfully be required under the fore- "going provisions of this section (or, "if the premium was required before "the commencement of this Act, "which could not lawfully have been "required if this Act had then been "in force), the amount of the pre- "mium, or so much thereof as could "not lawfully be required or have "been required as the case may be, "shall be recoverable by the person "by whom it is paid . . .".

Section 18, sub-s. 2: "the expres- "sion 'premium' includes any fine "or other like sum and any other "pecuniary consideration in addition "to rent".

Para. 1, Part I of Sched. I: "Where on an application under sec- "tion one of this Act made within "twelve months from the date of the "commencement of this Act it appears "to the Tribunal that before the "commencement of this Act any pre- "mium has been paid (whether law- "fully required or not) in respect of "the grant, continuance or renewal "of a tenancy of the dwelling-house "to which the application relates "whether by the tenant or by a "previous tenant of the dwelling- "house, and has not been fully repaid "or recovered, the Tribunal shall, if "the tenant so requires, certify that "this part of this Schedule applies ". . ." and subsequent provisions enable the tenant to recover the premium from the person to whom it has been paid.

In the present case the terms of the main agreement of July 31, 1948, make it clear that the builders, who were a party to the agreement, and willing to enter into the speculation or enterprise were willing to convert the premises for the sum of 18,000*l.* and only to look to the landlords for half that sum. It is abundantly clear from the agreement that the builders could never have sued the landlords for anything more than 9,000*l.* If they were to obtain more, tenants had to be found. Then each tenant had to agree to pay them 500*l.*, or he would not be granted a lease; but he had to pay that money not to the landlords but to the builders. The landlords never had any claim against the tenant for the 500*l.*, although they would probably not have granted the lease to anybody who had not agreed to sign the main agreement. The builders could only recover the balance of the 9,000*l.* from the various tenants up to 500*l.* each. The payments made by the tenants were made before the Act came into force. Supposing that this had been a case after the Act came into force, from whom could the tenants have recovered the money if they had paid it? They could not have recovered it from the builders because the consideration which supported the payments was not the grant of the lease but the work which the builders did in converting the premises. They could not have recovered it, as it seems to me, from the landlords, for the landlords had not received the money.

I think that we are bound to construe the word " premium " here as a payment made to the landlord and not to a third person, even though that third person may be a party to an agreement to which the landlord and the tenants are also parties. I think

(2) [1915] 1 K. B. 821; [1915] 3 K. B. 485.

that if we did not construe the Act in that way extraordinary difficulties would arise, because the construction that we give to the word "premium" as found in s. 1 and Sch. I must equally apply to the term as found in s. 2, where a right of action is given to the tenant to recover the premium which he has paid. For these reasons it seems to me that the sums of money paid in this case were not premiums.

The present case is not, to my mind, on all fours with *Rex* v. *Fulham, etc., Rent Tribunal; Ex parte Philippe* (3). There a tenant was taking a lease of premises in Adam and Eve Mews, Kensington. One of the terms of the lease was that he should do certain work—that was not a pecuniary consideration—to the premises. Instead of his doing the work himself, or of the landlord's requiring him to do so, it was agreed between the landlord and the tenant that the landlord would do the work. The landlord was only in the position, under that agreement, of an independent contractor. It was, in effect, just as if the tenant had employed another builder to do the work. Therefore it was held that the Act did not apply. The facts here are different: here the money was paid to independent builders.

In *Rex* v. *Barnet, etc., Rent Tribunal; Ex parte Millman* (4), it was stated in the judgment of the court: "Read in their widest "sense the words 'in respect of' would cover the payment of "money for whatever purpose so long as it could be said that no "tenancy would have been granted but for the payment. Thus "the words would cover the purchase price of the stock taken "over or the reimbursement to the landlord of the proportion of "any outgoings such as rates, insurance and the like, paid in "respect of the period covered by the tenancy. No doubt, it "may not be easy in some cases to say whether a payment comes "within these words, but where, as here, a payment is made for "the genuine purchase of the goodwill of a business and against "the seller entering into a restrictive covenant not to carry on "a similar business, we do not think that it can be said to have "been paid 'in respect of' the grant".

That case was very different on its facts from the present: a sum of money was there paid for the goodwill of a business. But the case shows that, although it may be that, as in that case, the tenant would never have got the premises if he had not agreed to pay the sum in question for the goodwill of the business which was attached to them, the court would not regard the money that was paid for that goodwill as money paid in respect of the grant of the tenancy. In the present case I prefer to base my judgment on the proposition that, on its true construction, this Act was intended to apply only to a pecuniary consideration paid to the landlord. If the landlords here had entered into an agreement by which they had made themselves liable to the builders for the full amount, and had then insisted that the tenant, as a condition of the grant of the lease, should discharge a part of that liability, the tenant would obviously be paying a sum on behalf of the landlords, which would be the same as if he had paid it to them; but it is clear from the agreement in the present case that its scheme is that the landlords are liable for no more than 9,000*l*. and that the rest of the money due to the builders has to be found by the respective tenants.

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(3) [1950] W. N. 304; 48 L. G. R. 544.

(4) [1950] 2 K. B. 506, 509, 510

Therefore in my opinion there has been no payment of premiums to the landlords—no payment of a premium as a consideration for the grant of a tenancy within the meaning of the Act, and the application for certiorari must be granted.

HILBERY, J. I agree. I find further support for the view that my Lord has expressed in the words used in the Act itself, when it is remembered what in law those words have come to mean. The Act of 1949 expressly uses the terms " rent " and " premium ". The word " premium " is, as my Lord has pointed out, a term of art. In *King* v. *Earl Cadogan* (5) Warrington, L.J., said (6): " Now the Legislature in expressing its intention " has chosen to use two words—' rent ' and ' premium '—both of " which in connexion with leases have perfectly well known legal " meanings. I need not say anything about the meaning of the " word rent, but ' premium ', as I understand it, used as it " frequently is in legal documents, means a cash payment made " to the lessor, and representing, or supposed to represent, the " capital value of the difference between the actual rent and the " best rent that might otherwise be obtained ".

When one bears in mind the evil at which the Act of 1949 and the earlier Rent Restriction Acts were aimed, I think that it is clear that that is the meaning which the Act of 1949 intended the word " premium " to have. In order to get round the situation that the rents for houses were fixed by the Rent Restriction Acts and could not be increased, notwithstanding all the increases in the cost of labour and materials to which the landlord might be put in keeping the premises in repair, and notwithstanding that rents generally had increased owing to the shortage of accommodation, there were landlords who demanded premiums for lettings which were at a standard rent so that they could recoup themselves the difference between the standard rent and the market rent. The evil aimed at, therefore, was

(5) [1915] 3 K. B. 485.

(6) [1915] 3 K. B. 485, 492.

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that of obtaining a premium payable to the landlord, a premium in the true legal sense of the word.

In addition, s. 18, sub-s. 2, of the Act of 1949 does not contain a true definition of the word premium, but a statement that it shall include certain things. That is, in my view, additional ground in support of the interpretation which we are putting upon the Act today. That sub-section speaks of payments "in addition to rent". An addition to rent would normally, I suppose, be something payable to a landlord.

I have called attention to what I think are additional matters in support of my Lord's construction of the Act, with which I am in entire agreement.

Parker, J. I agree.

Application granted.

Solicitors: *Church, Rendell, for Westwood, Morris & Co., Birmingham; the Solicitor, Ministry of Health.*

C. A.

1950
Dec. 19.

Asquith and Denning, L.JJ., and Harman, J.

COURT AND ANOTHER v. ROBINSON AND ANOTHER.

[Plaint No. F. 92.]

Landlord and tenant—New-control house—Assessment of standard rent—Lease providing premises should only be used as working-men's social club—House not let as dwelling-house—Premises used as beer-house—No evidence whether owner-occupied or let—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*a*)—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 & 24 *Geo.* 5, *c.* 32), *ss.* 6 *and* 16, *sub-s.* 1—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3, *and First Schedule.*

Premises were let on lease with a covenant that the tenant should use them only for the purposes of a working-men's social club. On the issue whether the premises were let "as a separate dwelling" (see s. 16, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933) evidence was given by a rent-collector that one of the two tenants had lived on the premises and had a guest residing with him.

Held, that the premises were let for business purposes and not as a separate dwelling. The user had been specified in the lease and there was no evidence that the contract in the lease had been superseded by a different contract between landlords and tenants providing that the premises should be used as a separate dwelling.

Cases in which premises were let as an hotel or lodging-house, or where there was a covenant by the tenant not to use them otherwise than as an hotel or lodging-house (see *Burns* v. *Radcliffe* [1923] 2 I. R. 158; *Vickery* v. *Martin* [1944] K. B. 679; and *Kitchen's Trustee* v. *Madders* [1950] Ch. 134) distinguished.

Wolfe v. *Hogan* [1949] 2 K. B. 194 and *Whitty* v. *Scott-Russell* [1950] 2 K. B. 32 followed.

APPEAL from Judge Clothier, sitting at Lambeth county court.

The plaintiffs were the owners of No. 86 Gypsy Hill, Upper Norwood, described in the current lease as a "shop and "premises". The house was at least 100 years old, and nothing was known about its occupation up to 1904. From that year to 1935, all that was known was that it was used as a beer-house, whether occupied by the owners or let. On December 31, 1935, it was let by the Express Dairy Co. Ld., then the freeholders, to two tenants, McCarthy and Jones, on a quarterly tenancy at a rent of 65*l.* a year. This, the first lease, provided that the lessees should use the premises only for the purposes of a working-men's social club, and there was a negative covenant that the lessees would not use or permit the premises to be used otherwise than for the purposes before described.

By the second lease, dated January 5, 1938, the same freeholders let the same premises to two tenants, McCarthy and Plummer, at the same rent, payable quarterly, as from December 1, 1937, for use for the same purposes, with a similar negative covenant. By the third lease, dated April 11, 1940, the same freeholders let the same premises to two tenants, Trappitt and King. That lease also contained an undertaking by the tenants to use the premises only for the purposes of a working-men's social club; but the negative covenant was no longer present.

In 1940 the premises were badly damaged by enemy action and remained for a considerable time unoccupied. When the fourth lease of the premises was being negotiated in May or June, 1947, and the bomb damage was being repaired, the negotiating tenant, the first defendant, was allowed by the landlords to move into part of the shop and part of the house. He was permitted to do that by paying 2*l.* a week, and the county court judge found that, as and when the rooms in the bombed premises became available, the defendant was allowed to move in and "2*l.* a week "was fixed as a temporary rent for 'partial use of the house and "'partial use of the shop'. Though lease No. 4 was still being "negotiated, this defendant in July, 1947, paid 52*l.* rent in "advance in respect of the June quarter day of that year". By the fourth lease, dated November 5, 1947, the landlords, the plaintiffs, let the premises to the first defendant at 208*l*. a year. It contained no stipulation restricting the use of the premises for the purposes of a working-men's social club.

The landlords sued the tenant and the second defendant—as being a person in whose favour the tenant, in breach of covenant, had parted with possession of part of the premises—in the county court for possession, claiming that the lease had been forfeited. As the tenant had parted with possession of part of the premises to the second defendant without the written consent of the landlords, they first based their claim on that breach of covenant. Later they discarded that ground, and relied on the breach of the covenant to pay rent. They also claimed for arrears of rent and mesne profits on the basis that the rent was 208*l*. a year. The rateable value of the premises was between 40*l*. and 50*l*. a year, and the premises were a "new-control house". If the standard rent was 208*l*. a year, then considerable arrears of rent were due. The tenant contended that the standard rent should be fixed by the terms of the second lease, current on September 1, 1939, or, alternatively, by certain other leases. If that were so, the tenant had paid sums in excess of the standard rent, leaving a balance for which the tenant could counterclaim. He had paid the arrears of rent into court, on a plea for relief, on the basis that the rent was 208*l*. a year (see s. 146 of the Law of Property Act, 1925); but, by the time of the trial, he and, apparently, the second defendant had left the premises.

The tenant called a rent-collector, who said that between 1935 and 1938 or 1939 (during the currency of the first lease) one of the tenants was living in the premises and even had a guest staying with him there; and the defendant tenant contended that the rent-collector's knowledge must be imputed to the lessors at the time. On the issue whether the premises were let or owner-occupied from 1904 to 1935, while they were used as a beer-house, the tenant tendered a witness. The judge excluded that evidence partly on the ground that at no time were licensed premises within the Rent Restriction Acts. The Court of Appeal held that that ground was erroneous in law: see *Epsom Grand Stand Association Ld.* v. *Clarke* (1). But the court also held that there was reason to believe that the judge had also rightly excluded the evidence as hearsay.

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(1) [1919] W. N. 170; 35 T. L. R. 525.

The registrar fixed the standard rent at 208*l*. a year. The judge confirmed that assessment, and made an order for possession. The money in court was ordered to be paid out to the landlords.

The defendant tenant appealed against both orders.

Ian Fife and *R. A. Gatehouse* for the defendant tenant. The standard rent of No. 86 Gypsy Hill in the first instance was the rent at which it was let on September 1, 1939: see s. 12, sub-s. 1 (*g*), of the Act of 1920, as amended by the Act of 1939 (2). At that date it was let under the lease of January 5, 1938 (lease No. 2), with a covenant by the tenants, both positive and negative, that they would use the premises only for the purposes of a working-men's social club. These purposes so stated are ambiguous, and the purposes may, therefore, be ascertained by extrinsic evidence. The fact that the premises were let as a working-men's social club is in no way inconsistent with the caretaker's and her family's sleeping there and with her guests' sleeping there. Further evidence was given that while these premises were let for those purposes one of the tenants was living at the premises and even had a guest living there. These premises were let " as a separate " dwelling ": see s. 16, sub-s. 1, of the Act of 1933. In *Kitchen's Trustee* v. *Madders* (3) it was held that the nature of the business of a private hotel or boarding-house was not incompatible with the residence there of the tenants, and that the premises were let as a dwelling-house and subject to standard rent. So in *Burns* v. *Radcliffe* (4) it was held that premises were occupied by the defendant as her dwelling-house although the real purpose of the letting was to carry on in them the business of a temperance hotel: see also the case of the Downs Hotel on Epsom racecourse —*Epsom Grand Stand Association Ld.* v. *Clarke* (5).

Bankes, L.J., there said (6) that if an agreement were to let premises as a barn, the tenant, even if he lived there, could not be heard to say they were let as a dwelling-house. But these premises were let as a working-men's social club, which is as consistent with a steward's living there, as it is in the case of the occupier of a hotel or boarding-house. Denning, L.J., in *Wolfe* v. *Hogan* (7) said that if the lease contained an express provision as to the purpose of the letting, it was not necessary (in the absence of a subsequent full agreement) to look further. But the comment may be made that a social club is sufficiently akin to an hotel or a boarding-house that it is not necessary to look further. Denning, L.J., then said that if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house was constructed for use as a dwelling-house, it was reasonable to infer the purpose was to let it as a dwelling. If, on the other hand, it was constructed for the purpose of being used as a lock-up shop, the reasonable inference was that it was let for business purposes. If the position were neutral, then it would be proper to look at the actual user. The purpose here, as has been submitted, if it did not involve or imply a use as a dwelling-house, was sufficiently neutral that it was proper to look at the actual user. And evidence was given before the county court judge that the actual user was that of a dwelling-house: see also *Vickery* v. *Martin* (8), which was a case where to the knowledge of the landlord the premises demised were used as a boarding-house. In that case the premises were held to be subject to the Rent Restriction Acts. The covenant there was that the tenant should use the premises as a private dwelling-house only and not carry on any trade or business there; but the court looked beyond the lease to the actual conditions of the user. But see the observations of Mr. Megarry, at p. 39, note (*d*), of the 5th edition of his work on the Rent Acts, which was cited with approval by Evershed, L.J., in *Wolfe* v. *Hogan* (9) and by Asquith, L.J., in *Whitty* v. *Scott-Russell* (10). No doubt Scrutton, L.J., said in *Barrett* v. *Hardy Brothers* (*Alnwick*) *Ld.* (11), " the important " matter is the rights under the lease, not the de facto use ", which supports the observations of Mr. Megarry. But that does not affect the position of the tenant here since the purpose of the letting was similar to that of premises let as a hotel or boarding-house. [*Williams* v. *Perry* (12) and *Gardiner & Co.* v. *Deptford Liberal Club* (13) were mentioned.] In any case a covenant of this description is sufficiently ambiguous to be explained by evidence of the actual user.

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(2) By s. 12, sub-s. 1 (*a*), of the Increase of Rent, etc., Act, 1920, as amended by the Increase of Rent, etc., Act, 1939, on its application to new-control houses: " The expression " 'standard rent' means the rent at " which the dwelling-house was let " on September 1, 1939, " or where the " dwelling-house was not let on that " date, the rent at which it was last " let before that date, or, in the case " of a dwelling-house which was first " let after " September 1, 1939, " the " rent at which it was first let ".

(3) [1950] Ch. 134.

(4) [1923] 2 I. R. 158.

(5) [1919] W. N. 170; 35 T. L. R. 525.

(6) [1919] W. N. 171.

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(7) [1949] 2 K. B. 194, 204.
(8) [1944] K. B. 679.
(9) [1949] 2 K. B. 194, 203.
(10) [1950] 2 K. B. 32, 39.
(11) [1925] 2 K. B. 220, 227.
(12) [1924] 1 K. B. 936.
(13) Mentioned in Mr. Megarry's work on the Rent Acts (5th ed.), at p. 39, as being reported [1924] Estates Gazette Digest 55.

If these premises were not let as a dwelling-house on September 1, 1939, to ascertain what was the standard rent the court must see the rent at which it was last let before that date as a dwelling-house: see *Davies* v. *Warwick* (14). The same observations which we have made apply to the first lease, that of December 31, 1935. Before that date from 1904 the premises were used as a beer-house.

[ASQUITH, L.J. What has not been proved during that period is that the premises were subject to any letting. The onus of proving that they were let is on the first defendant.]

The first defendant applied to tender evidence on that issue in the county court but he was not heard, the county court judge being of opinion that the Rent Restriction Acts did not apply to licensed houses. In this he was mistaken: see *Epsom Grand Stand Association Ld.* v. *Clarke* (15). We apply that this evidence may be heard in the Court of Appeal or that the case be remitted to the county court judge that he may hear it.

[ASQUITH, L.J. No. There is no application to hear further evidence in the Court of Appeal. There was good ground on which this evidence could have been excluded in the county court, namely, that it was hearsay.]

In any case the court is authorized to fix the standard rent during this time by having regard to the standard rents of similar dwelling-houses in the neighbourhood: see s. 6 of the Act of 1933. To obtain the standard rent the court must therefore turn to the first letting after September 1, 1939. By the landlords' letter of May 15, 1947, it appears that the first defendant was occupying a part of the demised premises—part of the shop and part of the dwelling-house—at a rent of 2*l.* According to his evidence, the first defendant, though at first he occupied only a part of the premises, gradually extended his occupation to that of the whole house, the rent remaining at 2*l.* a week. This then fixed the standard rent of these premises.

Boreham for the plaintiff. By the first, second and third leases of 1938, 1939 and 1940 the premises were let only for use as a working-men's social club. Those are the sole purposes. There is no ambiguity in the construction of these covenants: they are explicit in their terms. The word " only " settles that issue. It is therefore not necessary to look further: see the judgment of Denning, L.J., in *Wolfe* v. *Hogan* (16). Those premises were not by any one of the three leases let as a dwelling-house.

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(14) [1943] K. B. 329.

(15) [1919] W. N. 170; 35 T. L. R. 525.

Even if there were a breach of the covenant, the acceptance of rent has waived the breach up to that date, but the covenant persists. To establish that the house is used as a dwelling-house there must be proved by the first defendant that there is a new contract between the parties that the premises are taken as a dwelling-house. And that has never been proved in the case of any of these three leases. Asquith, L.J., in *Whitty* v. *Scott-Russell* (17) cited with approval this statement Megarry on the Rent Acts (4th ed.), at p. 19: "Where "the terms of the tenancy provide for or contemplate the use "of the premises for some particular purpose, that purpose is "the essential factor, not the nature of the premises or the actual "use made of them. Thus, if the premises are let for business "purposes, the tenant cannot claim that they have been con-"verted into a dwelling-house merely because somebody lives "on the premises . . .". Evidence was given in the county court that for a time McCarthy did live on the premises. The fact that a rent-collector knew that does not prove that the landlords knew of that fact, still less that they had acquiesced in the tenant's living on the premises. Further, as Bankes, L.J., said in *Epsom Grand Stand Association Ld.* v. *Clarke* (18): "If an agreement "were to let premises as a barn, the tenant though he lived there "could not be heard to say that they were let as a dwelling-"house". Where premises have been let for business purposes, it is only where the landlord, the person who has the power to grant a new lease, permits the tenant to use the premises as a dwelling-house, that the premises come within the Rent Restriction Acts: see the judgment of Parke, B., in *Doe* v. *Birch* (19), cited in Foa's General Law of Landlord and Tenant (7th ed.), at p. 638.

There was no evidence that the premises were let before the year 1935. Again, only part of the premises were let or licensed to the first defendant at a rent of 2*l.*, whilst negotiations were being conducted between the parties for the fourth lease dated November 5, 1947. That was an issue of fact decided by the county court judge. Under that lease the rent was payable as from the preceding June quarter day. The annual rent under that lease was 208*l*. per year and that rent was the standard rent of the premises.

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(16) [1949] 2 K. B. 194, 205.
(17) [1950] 2 K. B. 32, 39.
(18) [1919] W. N. 170, 171.
(19) (1836) 1 M. & W. 402, 408.

Fife replied.

ASQUITH, L.J. What has to be done is to apply the statutory provisions for the ascertainment of standard rent to the peculiar facts of this case. I will read the main provision first, s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Act of 1939 and its application to a 1939 controlled house, such as this house was: "The expression 'standard rent' means the rent at which the "dwelling-house was let" on September 1, 1939, "or, where "the dwelling-house was not let on that date, the rent at which "it was last let before that date, or, in the case of a dwelling-"house which was first let after" September 1, "the rent at "which it was first let".

Applying s. 12, sub-s. 1 (*a*), to the facts of this case, the defendant, in a very clear and able argument by his counsel, contended that the premises were let, and let as a dwelling-house, on September 1, 1939. He said that they were let under what I call lease No. 2, that is the lease of 1938. Undoubtedly they were let at that time, but were they let as a dwelling-house? Prima facie when you have a plain stipulation that premises are to be used solely for the purposes of, say, a working-men's social club, I should read that as excluding the notion that they were intended to be let or were let as a dwelling-house. When the lease itself specifies clearly a particular purpose for which, and a fortiori for which alone, the premises are to be used, for instance, for the purpose of an office or for the purpose of a barn, it is, as Denning, L.J., said in *Wolfe* v. *Hogan* (20), unnecessary to look further.

We have been referred to a great multiplicity of authorities, but I think for the present purposes I shall be absolved from any disrespect for the argument of counsel if I only refer to a few, because on this point the excerpts from the material authorities are assembled in *Whitty* v. *Scott-Russell* (21).

In my judgment there I said (22): "It is, however, argued "in answer to this objection that the Court of Appeal, in certain "of its decisions of which the most recent is *Wolfe* v. *Hogan* (23),

(20) [1949] 2 K. B. 194.
(21) [1950] 2 K. B. 32.
(22) Ibid. 39.
(23) [1949] 2 K. B. 194.

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"has held that, where there has been a formal instrument of "letting the terms of which express the purpose for which the "premises were let, this is conclusive, and evidence of any other "purpose derived from, for example, the actual use, is excluded. "In that case Denning, L.J., used language which lends strong "colour to such a contention when he said, in the opening sentences of his judgment (24): 'In determining whether a house "'or part of a house is "let as a dwelling" within the meaning "'of the Rent Restriction Acts, it is necessary to look at the "'purpose of the letting. If the lease contains an express pro"'vision as to the purpose of the letting, it is not necessary to "'look further, but, if there is no express provision, it is open "'to the court to look at the circumstances of the letting'.

"In that case there was no express provision in the lease "as to the 'purpose'. In the present case the tenant expressly "covenanted to use the premises as 'a private dwelling-house "'only', and, if Denning, L.J.'s proposition is to be taken as "both authoritative and unqualified, it clinches the tenant's "argument. Evershed, L.J., in the first judgment, appears to "accept this view, though whether with some, and, if so, "what, qualifications is a question which must be explored. "Bucknill, L.J., gave no reasons but simply agreed with the "judgment of Evershed, L.J. Evershed, L.J., cited *Gidden* "v. *Mills* (25) and the following passage among other pas"sages from judgments of the Court of Appeal: 'the important "'matter is the rights under the lease, not the de facto user': "*Barrett* v. *Hardy Brothers* (*Alnwick*) *Ld.* (26). 'If an agree"'ment were to let premises as a barn, the tenant, even though "'he lived there, could not be heard to say that they were let "'as a dwelling-house': per Bankes, L.J., in *Epsom Grand* "*Stand Association Ld.* v. *Clarke* (27). He then goes on to "approve this passage from Mr. Megarry's book on the Rent "Acts (4th ed.), p. 19: 'Where the terms of the tenancy provide "'for or contemplate the use of the premises for some particular "'purpose, that purpose is the essential factor, not the nature "'of the premises or the actual use made of them. Thus, if the "'premises are let for business purposes, the tenant cannot claim "'that they have been converted into a dwelling-house merely "'because somebody lives on the premises'. Mr. Megarry goes

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(24) [1949] 2 K. B. 204.
(25) [1925] 2 K. B. 713.
(26) [1925] 2 K. B. 220, 227.
(27) [1919] W. N. 170, 171; 35 T. L. R. 525.

"on to say that actual user at the time when possession is "claimed must be considered where the tenancy agreement contemplates no specified use. The only qualification annexed to "this general statement by Evershed, L.J., is contained in a "passage lower down on the same page (28): 'Again I wish to "'make it quite plain that I am saying nothing which should be "'taken as indicating that, if a tenant does change the user and "'creates, out of what was formerly a shop, a dwelling-house, "'and if that fact is fully known to and accepted by the other "'party to the contract, whether or not there is a prohibition, "'the result may not very well be that there will then be inferred "'a contract to let as a dwelling-house, although it may be a "'different contract in essentials from the contract which was "'originally made and expressed'. In other words, where the "original contract was for a particular user, but, by the time "the plaint is issued, it has been superseded by a subsequent "contract providing for a different user, the subsequent contract "may be looked to in deciding whether the premises are let as "a 'dwelling' or 'separate dwelling'".

There are cases in which a covenant not to use the premises otherwise than as an hotel or a lodging-house or a temperance hotel have been held not to be broken by the tenant sleeping there, nor the house thereby denuded of the protection of the Rent Restriction Acts; but those cases are clearly distinguishable to my mind from the present case because it may be difficult to conduct the business of an hotel efficiently without sleeping there, and in that case to sleep there would be to observe the covenant, not to violate it. That, I think, is the basis on which *Kitchen's Trustee* v. *Madders* (29) and *Vickery* v. *Martin* (30) proceeded.

The present seems to me to be an entirely different case. I cannot accept Mr. Fife's contention, speaking for myself, that "a "working-men's social club" is an ambiguous expression such as to permit one to deduce the intentions of the parties as to the user of the premises from extrinsic evidence. It seems to me to be very nearly as unambiguous as an undertaking to use premises solely as a shop or as an office or as a barn. Nor can I accept Mr. Fife's further argument that the intention so deducible from extrinsic evidence in this case was that the premises should be let as a dwelling-house. This last contention, based on the lessor's knowledge—not proved or brought home to him personally but imputed to him through his rent-collector—that McCarthy between 1935 and 1938 or 1939 lived in the premises, and even had a guest staying with him there, is that the lessors thereby assented to his doing so. Leaving aside the question of whether the lessors' rent-collector's knowledge could in such a matter be ascribed to the lessors—which seems to me on the authorities cited to us to be more than doubtful—much more knowledge is necessary to reveal the user to which the express terms of the lease restrict the lessee. The user prescribed in terms in the lease is what counts. If that is departed from through the parties making a new contract or varying the existing contract so as to permit or provide for a changed user, then the new user may for the present purposes be treated as the material one; but nothing short of the new contract or variation of the contract will to my mind suffice, and the facts proved in this case seem to me to fall far short of establishing such a contract.

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(28) [1949] 2 K. B. 194, 203.
(29) [1950] Ch. 134.
(30) [1944] K. B. 679.

If the standard rent is not determined by lease No. 2 (which was Mr. Fife's first contention) which was the lease at September 1, 1939, we must go back and ascertain when the premises were let next, before September 1, 1939, as a dwelling-house. Mr. Fife first went back to lease No. 1 (that is the lease of 1935) but this also contains a provision as to sole user as a working-men's club and the same considerations apply to it mutatis mutandis as I have already considered in connexion with lease No. 2.

Going further back we reach a period when the premises were used as a beer-house from 1904 to 1935. As regards this period the defendant fails in limine, because he cannot show that during this period the premises were let at all, and the onus is upon him to show that they were let, because, as I have said, the premises may be owner-occupied, as beer-houses often are. The defendant in the court below, through a witness called Spencer, tendered certain evidence which the judge excluded partly on the ground (which was erroneous in law) that at no time were licensed premises within the Rent Restriction Acts. *Epsom Grand Stand Association Ld.* v. *Clarke* (31) is an authority the other way, but there is reason to my mind for supposing that when the judge excluded that evidence he did not do so on that ground alone, and there was, in my view, ready to hand a perfectly valid ground on which the evidence could rightly be excluded, namely,

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(31) [1919] W. N. 170; 35 T. L. R. 525.

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that it could only come from a source which would make it hearsay.

Counsel for the defendant in this court asked for leave to adduce fresh evidence. He claimed that this evidence had been wrongly excluded and he asked us in the alternative to remit the matter to the county court judge to hear further evidence to make a further finding as to the status of these premises at this remote date. But that point was not taken in the notice of appeal. Applications to adduce further evidence before this court for the first time are hardly ever granted, and we felt bound to refuse both those applications.

Nor could we consent to determine the standard rent by the method which was made available in certain cases by s. 6 of the Act of 1933 (32). That section, judging by its opening lines, only applies where you start with a dwelling-house to which the principal Acts apply and which was let on the material date, whatever that date may be, and where the gap in your knowledge consists of the amount of the rent at which it was so let. I cannot see that that section has any application until it is shown that the house was let. When one has shown that and shown that it is impracticable to discover what the rent was, say, on September 5, 1939, then no doubt there is room for the provision to apply, but even then its application is discretionary.

Moving now to the period when the premises were let next after September 1, 1939, we come to lease No. 3 of 1940. I think that is the lease to Trappitt and King. Here there is no double provision for sole use as a working-men's club, but there is a single provision to that effect. Even if a thing is said only once and duplication is thereby avoided, that is no reason why effect should not be given to it mutatis mutandis. Therefore the reasons why, in my view, this lease also does not govern the standard rent are those which have been stated already in regard to the other leases considered above.

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(32) By s. 6 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, as amended by the Act of 1939 with regard to a new-control house : "If in any proceedings "in which the standard rent of any "dwelling-house to which the prin-"cipal Acts apply is required to be "determined, the court is satisfied "that it is not reasonably practicable "to obtain sufficient evidence to "enable the court to ascertain the "rent at which the dwelling-house "was let on September 1, 1939, or, "where the dwelling-house was not "let on that date, the rent at which "it was last let before that date, or in "the case of a dwelling-house which "was first let after the said Septem-"ber 1, 1939, the rent at which it was "first let, the court shall have power "to determine the standard rent, as "being, for the purposes of those "proceedings, of such amount as the "court thinks proper having regard "to the standard rents of similar "dwelling-houses in the neighbour-"hood . . .".

Finally, it appears that when lease No. 4 was being negotiated in May or June, 1947, and the bomb damage to No. 86 was being repaired the first defendant was allowed to move into No. 86 and to occupy part of the shop and part of the house. Permission to do that was given to him by letter dated May 15, 1947: "we "find that you are now occupying part of the domestic premises "at 86 Gypsy Hill. Will you kindly note that the rent from "Sunday last, the 11th instant, is 2*l.* per week for partial use of "the shop and partial use of the house". The defendant, all his previous arguments failing, relies on this as constituting a letting for 2*l.* a week. They say that, at any rate according to his own evidence, the first defendant, though he may at first have occupied only part of the house, proceeded to occupy the whole of it, and that therefore that 2*l.* a week was to be treated as rent for the whole of it. When the first defendant says he occupied the whole, he may, of course, refer to no more than the de facto use, although he had no right to do more than occupy a part, but the judge has found, and it is a finding of fact: "As "and when the rooms in the bombed premises, No. 86, became "available, Robinson was allowed to move in. 2*l.* a week was "fixed as a temporary rent for 'partial use of the house and "'partial use of the shop'. Therefore it was only a temporary "expedient, and I cannot accept that rent as being the standard "rent".

The judge has found that, according to the terms of that arrangement (which may after all not have been a tenancy at all, but a mere licence), the consideration of 2*l.* was for only part of the premises and that was not the same subject-matter as that the standard rent of which now we are trying to ascertain. In any case that arrangement, limited as it was in space, was very limited also in time, because in July, although lease No. 4 had not yet been entered into, since it was still the subject-matter of negotiation it cast its shadow before it. 52*l.* had been paid in July in respect of the quarter day on June 24 of that year, and that obviously superseded the 2*l.* arrangement.

In the result I am of the opinion that the judge and the registrar were right in taking lease No. 4 as determining the standard rent, and I think the appeal should be dismissed and the orders appealed from should stand. As to the order for possession, I am not very clear what the position is, but I think it is that there was a forfeiture in December, 1949, which was clinched by the issue of the summons, and this being so, in the normal course a statutory tenancy might have sprung up then between the first defendant and the landlords, but it did not do so because the first defendant and the second defendant had already moved out, and a defendant who quits the premises forfeits the protection of the Rent Restriction Acts and the bar to make an order for possession against him is removed.

For these reasons I think the appeal should be dismissed.

DENNING, L.J. This is another case, of which we have had several lately, where a tenant has sought to push to an extreme length the advantages which have been conferred upon him by the Rent Restriction Acts. In November, 1947, the tenant, being advised by a solicitor, freely took a lease for twenty-one years of a shop and dwelling-house at a rent of 208*l.* a year, that is, 4*l.* a week. Now he turns round and says he can have the benefit of that lease for the full twenty-one years for the sum of 1*l.* a week, or thereabouts, and can reclaim the excess paid. The reason is because he has discovered that the premises were let in 1939 at 1*l.* a week, or just a little over, and he says that this is the standard rent. I would just pause to point out that if the standard rent is the 4*l.* a week and is too high, the tenant can apply under the Landlord and Tenant (Rent Control) Act, 1949, to have it reduced to a reasonable amount. But if the standard rent is only 1*l.* a week and is too low, there is no power for the landlords to apply to have it increased to a reasonable amount. But none of these considerations matter. The only question is: what is the standard rent?

In 1939 the premises were let on a lease which contained an express term that the tenant was "to use the premises for the "purposes of a working-men's social club only". Was that a business letting or was it a letting as a dwelling? Inasmuch as there was an express term in the lease showing the purpose of the letting, that is, prima facie, the only thing that matters. It is not necessary to look further unless there is evidence from which it may be inferred that the landlord affirmatively assented to a change of user: see *Wolfe* v. *Hogan* (33). In my opinion the letting "for the purposes of a working-men's social club only" was a letting for business purposes and not a letting as a dwelling. It is true that a steward might quite lawfully sleep there without

(33) [1949] 2 K. B. 194.

being guilty of a breach of covenant, but that does not mean it was let as a dwelling. It is rather like premises let as a warehouse. The fact that a caretaker stays there does not make it a letting as a dwelling. It is quite different from the letting of an hotel or boarding-house, which necessarily involves that the person in charge will use it as a dwelling. A working-men's social club does not involve anyone dwelling there.

There was no evidence that the landlord ever assented affirmatively to a change of user. It is true that the agent who collected the rents knew that a club member and his family lived there for a time. But a rent-collector has no authority to make a lease or to vary a lease or to assent to a change of user; and, even if he had, the acceptance of rent by him for a few months, with knowledge of the user, would not be enough to show that there had been a variation of the original contract as to user: see *Wolfe* v. *Hogan* (33).

In my opinion, therefore, the lettings as a working-men's social club can be ignored. The true standard rent in this case is 208*l*. a year. If that is too much there is a tribunal which can reduce it to a reasonable amount.

I agree that the appeal should be dismissed.

HARMAN, J. I agree.

Appeal dismissed.

Solicitors: *Howard G. Thomas; Bennett, Welch & Co.*

C. G. M.

(33) [1949] 2 K. B. 194.

1951
Jan. 17.

Lord Goddard, C.J., Hilbery and Devlin, JJ.

REX *v.* LONDON SESSIONS; *Ex parte* ROGERS.

Criminal law—Procedure—Offence triable summarily—Committal of prisoner to quarter sessions for sentence—Appeal against committal order—Competence—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 29, *sub-ss.* 1, 3 (*a*) (*d*); *s.* 36, *sub-ss.* 1, 2.

An order by a court of summary jurisdiction committing a prisoner to quarter sessions for sentence under s. 29, sub-s. 1, of the Criminal Justice Act, 1948 (1), is not a "sentence" against which a right of appeal is conferred by s. 36, sub-s. 1, for it is not "any

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[Reported by MISS E. DANGERFIELD, Barrister-at-Law.]

"order made on conviction by a court of summary jurisdiction" within the definition in s. 36, sub-s. 2.

1951

REX
v.
LONDON
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Ex parte
ROGERS.

APPLICATION for an order of mandamus.

The appellant pleaded guilty before the magistrate to two charges of unlawfully obtaining and attempting to obtain by false pretences 26*s*. from the National Assistance Board. The magistrate decided to commit him to quarter sessions for sentence under s. 29 of the Criminal Justice Act, 1948 (1). The applicant served notice of appeal against his committal, but, when he appeared before the appeals committee of London Sessions, they held that he had no right of appeal.

He therefore applied for an order of mandamus directing quarter sessions to hear his appeal.

Heathcote-Williams, *K.C.*, *E. C. S. Russell* and *R. D. Ross* for the applicant. A committal order made under s. 29, sub-s. 1, of the Criminal Justice Act, 1948, is not a judgment, but it is within the definition of "sentence" in s. 36, sub-s. 1, being an "order made on conviction". It is submitted, therefore, that an appeal lies from the order which was made in consequence of the conviction.

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(1) Criminal Justice Act, 1948, s. 29, sub-s. 1: "Where . . . a person . . . is tried summarily by a "court of summary jurisdiction for "an indictable offence, and is convicted by that court of that offence, "then if, on obtaining information as "to his character and antecedents, "the court is of opinion that they are "such that greater punishment should "be inflicted in respect of the offence "than that court has power to inflict, "the court may, in lieu of dealing "with him in any manner in which "the court has power to deal with "him, commit him in custody to "quarter sessions for sentence . . .".

Sub-section 3: "Where an offender "is so committed for sentence . . . (*a*) "the appeal committee or court of "quarter sessions shall inquire into "the circumstances of the case, and "shall have power to deal with the "offender in any manner in which "he could be dealt with by a court "of quarter sessions before which he "had just been convicted of the "offence on indictment; (*b*) the Poor "Prisoners Defence Act, 1930, shall "apply as if the offender were committed for trial for an indictable "offence . . ." subject to certain modifications; (*c*) "the Costs in "Criminal Cases Act, 1908, shall "apply in relation to the proceedings "before the appeal committee or court "of quarter sessions as it applies in "relation to the prosecution of an "offence before a court of quarter "sessions; (*d*) if the appeal committee or court of quarter sessions "passes a sentence which the court of "summary jurisdiction would not "have had power to pass, the offender "may appeal against the sentence to "the Court of Criminal Appeal as if "he had been convicted on indictment; and the provisions of the "Criminal Appeal Act, 1907, shall "apply accordingly".

Section 36, sub-s. 1: "A person "convicted by a court of summary "jurisdiction shall have a right of "appeal—(*a*) if he pleaded guilty or "admitted the truth of the information, against his sentence".

Sub-section 2: "For the purpose of "the last foregoing subsection, the "expression 'sentence' includes any "order made on conviction by a court "of summary jurisdiction, not being "—(*a*) a probation order or an order "for conditional discharge; (*b*) an "order for the payment of costs; (*c*) "an order under s. 2 of the Protection of Animals Act, 1911 . . .; (*d*) "an order made in pursuance of any "enactment under which the court "has no discretion as to the making "of the order or the terms thereof".

T. F. Southall, for the prosecutor, was not called on to argue.

LORD GODDARD, C.J., [referred to s. 29, sub-s. 1, and continued:] As I have said on more than one occasion, the reason for this section is well known; it was to get rid of the effect of the two cases, *Rex* v. *Sheridan* (2) and *Rex* v. *Grant* (3), in which justices had convicted a prisoner summarily of an indictable offence. Then, having heard his record, they said if they had known of that record they would not have dealt with him summarily, and so they committed him for trial. When the prisoners were indicted at quarter sessions a plea of autrefois convict was entered on their behalf. It was held in each case that the plea of autrefois convict succeeded on the ground that, having been convicted by the justices, the prisoners could not be indicted at quarter sessions. But it was seen at once that it would be very useful if a prisoner could be committed to quarter sessions for sentence, for otherwise justices would have to inquire into the prisoner's record before they decided to convict, and many justices objected to that, because they thought it might influence their decision. Accordingly s. 29 of the Act of 1948 was passed, which enables justices first to decide on the guilt or innocence of the accused person and then, having convicted him if they think he is guilty, they can decide to send him forward to quarter sessions for sentence.

Examination of the whole structure of s. 29, it seems to me, makes it perfectly clear that, from the time when the justices decide to commit the prisoner to quarter sessions for sentence, the case should be regarded as though it were a committal for trial, the only difference being that quarter sessions will not have to inquire into the facts of the case but will treat it as though the prisoner were before them on a plea of guilty. That is shown by s. 29, sub-s. 3. In other words, they are to deal with him as though he had been convicted before them. That is why in *Rex* v. *Middlesex Justices; Ex parte Director of Public*

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(2) (1936) 52 T. L. R. 626; 155 L. T. 207.

(3) (1936) 52 T. L. R. 676; 155 L. T. 209.

Prosecutions (4) we decided that a certain order made under this section sending a man forward for sentence was a nullity; quarter sessions had no power to deal with that particular prisoner because the offence with which he was charged was not one which by statute quarter sessions had jurisdiction to try.

[His Lordship read paras. (*b*), (*c*) and (*d*) of s. 29, sub-s. 3, and continued:] That means that if a prisoner receives longer sentence than six months from the court of quarter sessions, he can have an appeal to the Court of Criminal Appeal. If quarter sessions only see fit to pass a sentence which the justices could have passed he does not get a right of appeal. It seems to me that that section, when it is looked at in full, makes it clear that a person who is committed to quarter sessions for sentence is to be treated in exactly the same way as if he were indicted at quarter sessions.

[His Lordship read s. 36, sub-ss. 1 and 2, of the Act of 1948, and continued:] It is argued for the applicant that s. 36 gives him a right of appeal against the committal order, because, so it is said, that order is made "on conviction". It seems to me perfectly clear that the mere committal for sentence cannot be an "order made on conviction by a court of summary jurisdiction" within the meaning of that sub-section, for so to hold would really make nonsense of and nullify this whole new procedure which Parliament has set up. What would happen? Suppose that petty sessions decide not to pass sentence because they cannot give a sufficiently severe one. If the applicant's argument were right, then, when he was committed to quarter sessions they would be entitled to say that they did not think that the justices at petty sessions ought to have come to that conclusion and to send the prisoner back to those justices. I cannot think that that was meant. I agree with the observations of my brother Devlin in the course of the argument, that a construction which is possible on the bare words of a section ought not to be adopted if it would make nonsense of new procedure which the Act in question was designed to set up.

I do not think that a committal to quarter sessions for sentence can be included in the words "any order made on "conviction by a court of summary jurisdiction" in s. 36, sub-s. 2. I think that these words, as I said in *Rex* v. *London Sessions; Ex parte Beaumont* (5), include such matters as disqualification from holding a driving licence or firearms, or forfeiture of goods or restoration of goods, which are part of the judgment of the court.

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(4) [1950] 2 K. B. 589.

(5) [1951] 1 K. B. 557.

I think that quarter sessions were quite right in holding that they had no power to entertain this appeal.

HILBERY, J. I concur.

DEVLIN, J. I concur.

Application dismissed.

Solicitors: *Freeborough & Co.; The Solicitor, Ministry of National Insurance.*

1951
Jan. 22, 26.

Lord Goddard, C.J., Humphreys and Devlin, JJ.

PATEL *v.* WILLIS.

Emergency legislation—Prohibition against export—Goods supplied to agent not for export—Meaning of "supply"—Burden of proof—Declaration—Principal's name signed by agent and date endorsed by recipient—Validity—Utility Mark and Apparel and Textiles (General Provisions) Order, 1947 (*St. R. & O.* 1947, *No.* 2642), *art.* 18 (4.)—*Knitted Goods (Manufacture and Supply) Order,* 1948 (*S.I.* 1948, *No.* 316, *as amended by No.* 994), *art.* 3 (2.); *art.* 3A (1.).

An agent who had authority from the buyer of certain nylon stockings to deal with them on his behalf, took delivery of them from the manufacturer against a declaration.

Held, that there was a "supply" of those goods to the agent within the meaning of the Knitted Goods (Manufacture and Supply) Order, 1948, for which purpose "supply" was defined as supply in pursuance of a contract and supply as a gift.

The declaration was signed by the agent in the name of his principal. It was not dated by him, but the date was afterwards endorsed on it by the manufacturer.

Held, that the declaration was signed and dated by the agent within the meaning of art. 3 (2) of the order, since there was a signature by him in the name of his principal and the date was added with the implied authority of the agent.

The declaration was in the form required by art. 3 (2) providing that the goods should not be supplied otherwise than by exportation or to a person who surrendered a similar declaration.

The agent delivered the goods to certain other persons, who consigned them by rail to places in England, but there was no evidence regarding the precise circumstances in which he so delivered them.

Held, that the court might nevertheless properly find in the circumstances that there was a "supply" by the agent, otherwise than in accordance with his declaration, in contravention of art. 3A (1.) of the order, for the prosecution, to prove such a supply, need only prove a delivery in circumstances from which, unless they were otherwise explained, the natural inference was that the delivery was either under a contract or as a gift, and if the agent had obtained a second declaration on delivering the goods it was for him to produce it.

CASE STATED by London sessions.

The defendant was charged with a breach of art. 3A (1.) of the Knitted Goods (Manufacture and Supply) Order, 1948 (1), and convicted by a metropolitan magistrate.

He appealed against conviction to the appeals committee of London sessions, who dismissed the appeal subject to the following case.

In 1948 one V. S. Sastry registered himself as a firm with the name of the Central Oriental Agency. On May 18, 1949, the defendant, Patel, called on a company of hosiery manufacturers, stated that he represented that agency, and ordered for export to Pakistan nylon stockings. That order was confirmed by a written order signed by Sastry. On June 17, 1949, the defendant called on the company again to take delivery of some of the stockings. The general manager of the company asked him for a declaration in the terms required by the Knitted Goods (Manufacture and Supply) Order, 1948 (1).

The defendant said that such a declaration was in the post. The manager of the company refused to hand over the goods in the absence of such declaration. Thereupon the defendant wrote the words "V. Shastri" at the foot of a form of declaration as required by the order, and the manager handed the stockings to him. The defendant took them and placed them in a waiting taxi where there was sitting another oriental. The taxi drove to King's Cross Station, dropping the defendant on the way. There the other oriental sent the goods by train, part to Leeds and part to York. At each place they were collected by another oriental.

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(1) Knitted Goods (Manufacture and Supply) Order, 1948 (which was made under the Defence (General) Regulations, 1939), art. 3 (2), as amended by the Knitted Goods (Manufacture and Supply) (Amendment) (No. 2) Order, 1948: "A "manufacturer shall not supply" certain goods (including nylon stockings) "otherwise than (*a*) by . . . exporta-"tion . . . ; or (*b*) to a person who "surrenders a declaration in writing "signed and dated by him that he "will not supply those goods except "(i) by such exportation as aforesaid "or (ii) to a person who surrenders "a" similar declaration.

By art. 3A (1): "A person to "whom goods have been supplied "against the surrender by him of any "such declaration . . . shall not "supply any such goods . . . except "in accordance with that declara-"tion".

By art. 13 (3) (applying art. 18 (4) of the Utility Mark and Apparel and Textiles (General Provisions) Order, 1947): "'supply' means supply in "pursuance of a contract of sale, "work, and labour with or without "the provision of materials, sale or "return, hire, hire-purchase, barter "or a contract of any other descrip-"tion, and supply as a gift".

The declaration was not dated, but the manager of the company afterwards endorsed on it a memorandum of the date—June 17, 1949.

It was contended for the defendant (i) that neither had he been supplied with nor had he supplied goods within the ordinary meaning of the word "supply" or within the meaning of the word as defined in the Utility Mark and Apparel and Textiles (General Provisions) Order, 1947, art 18 (4.) (applied to the Order of 1948 by art. 13 (3.) of that Order); and (ii) that he had not surrendered the declaration within the meaning of art. 3 (2.) of the Order of 1948 in that the declaration was given only on behalf of a person on whose behalf he was acting, and was not signed or dated by the defendant.

It was contended for the prosecutor that the acts complained of amounted to the offence charged, the defendant being either a principal or an aider or abettor.

The defendant now appealed against that decision.

Platts-Mills for the defendant.
G. Pollock for the prosecutor.

Cur. adv. vult.

January 26. DEVLIN, J., delivering the judgment of the court, considered the facts and said that one object of the Knitted Goods (Manufacture and Supply) Order, 1948, was to prevent the sale in the home market of goods such as nylon stockings manufactured for export. He continued:—

Before the defendant can be convicted of the offence with which he is charged it is necessary for the prosecution to prove two acts of supplying, first by the company to the defendant, and secondly by the defendant to some third party. It is contended on the defendant's behalf that there was no supplying to him but only to Sastry; and further that there is no evidence on which it can be said that he supplied to a third party. The case has thus given rise to a discussion on the meaning of the word "supply" which is of some importance, inasmuch as it is the word commonly used in regulations of this type, and there appears to be no authority upon it. [His Lordship read the definition of the word in the Order of 1948, and continued:] There is no doubt that there was a contract of sale between the company and Sastry. There is likewise no doubt that if the stockings had been delivered to Sastry they would have been supplied to him. But they were delivered to Sastry's agent. The definition of "supply" is very wide, but it is not, of course, every sort of delivery that amounts to a supply under "a contract of any "description". It may well be that if goods are delivered to an agent of the seller, whose duty is merely to collect them—in short, to a mere messenger—the goods would not be supplied to the messenger. It is unnecessary to express any concluded view about that, for it is plain that the defendant was much more than that. In our judgment, if goods are delivered to an agent who has authority to deal with them on behalf of his principal, they are supplied as much to the agent as to the principal. There was ample material on which the appeal committee could come to the conclusion that the defendant was an agent in this class.

[His Lordship further considered the facts, and continued:] We think it plain that he took delivery of the stockings as one clothed with authority to deal with them on behalf of the firm.

Have the prosecution discharged whatever burden is upon them in relation to the second part of the case, and is there material sufficient to justify the conclusion that the defendant supplied the stockings to a third party otherwise than for exportation or against another declaration (see art. 3 (2.) (ii) of the Order of 1948)? The facts on this point are scanty, but we think that they are enough. In our judgment the prosecution, in order to prove a supply, must prove a delivery in circumstances from which, unless they are otherwise explained, the natural inference is that the delivery was either in pursuance of a contract or as a gift. Once the prosecution have proved this, it is, we think, for the defence to show upon what terms the goods were supplied. This is because the terms of the contract between the supplier and the third party are a matter peculiarly within the knowledge of the supplier. The burden is therefore not cast upon the prosecution in the first instance of adducing material to show that the goods were delivered to the third party otherwise than for exportation. Similarly, upon well-established principles, if the defence have obtained from the third party a declaration in the terms of the order, it is for them to produce it.

We must take it that the defendant was either unable or unwilling to give any explanation to quarter sessions why he handed the goods to the oriental which quarter sessions thought sufficiently credible to form the basis of any finding of fact. In these circumstances, we think that, once it is proved that an agent in the defendant's position handed to a third party goods which were dispatched to their destination by train, the proper inference, in the absence of any other satisfactory explanation, is that they were being supplied under one or other of the forms of contract so widely set out in the definition to which we have referred. As nothing was placed before the court to show whether that contract was for exportation or not, and no declaration was produced, we think that quarter sessions were justified in their conclusion that there had been a breach of the order.

One other point was taken for the defendant, namely, that the declaration was unsigned and undated; unsigned because the defendant had put upon it not his own name but one which purported to be, and was taken by the manager of the company as being, the name of his principal; and undated because the date was not on it at the time of signature. So it is contended that the defendant was not supplied with goods against a declaration in writing signed and dated by him, and that therefore the case is not within art. 3A. The point is quite unmeritorious since, if there was no proper declaration, the defendant not merely aided and abetted, but actively procured, the commission of an offence by the manufacturer under art. 3 (2.). In any event we think that there is nothing in the point: there was a signature by the defendant with the name of his principal; and the document was in fact dated by the manager, clearly with the implied authority of the defendant.

Appeal dismissed.

Solicitors: *Temple & Co.; Solicitor, Board of Trade.*

R. P. C.

CUMBES *v.* ROBINSON.

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Somervell, Singleton and Denning, L.JJ.

[Plaint F. 5081.]

Landlord and tenant—Rent restriction—Shop with dwelling-house above let on one tenancy—Shop sub-let by tenant—Notice to quit served by landlord on tenant—Separate leases of shop and of dwelling-house granted by landlord to same tenant—Standard rent—Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3, *sub-s.* 3.

There is nothing in the Rent Restriction Acts which prevents a shop and adjoining living premises from being let separately notwithstanding that they may have at one time been let together.

Phillips v. *Hallahan* [1925] 1 K. B. 756 applied.

By agreement with the tenant a landlord let by separate leases, at separate rents, a shop and a dwelling-house which were at the time in the occupation of the tenant who had theretofore held them under a single lease, which had been terminated by a notice to quit.

Held, that the shop was no longer within the protection of the Acts by virtue of s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939, as a shop let with a dwelling-house, and the tenant was not entitled to have the rent under the separate leases reduced to the amount of the standard rent when the shop and dwelling-house were let together.

The principle laid down in *Phillips* v. *Hallahan* (supra), although limited by Bankes, L.J., to cases where the landlord had obtained possession, extends also to a case where the tenant is in possession of the whole of the premises, so long as there is a genuine separation into two tenancies for some good reason.

APPEAL from Judge Langman, sitting at Worcester county court.

In 1941, premises at No. 17 Bridge St., Worcester, consisting of a shop with living rooms above it, were let to the plaintiff at a weekly rent of 1*l*. The plaintiff sub-let the shop to one Wilson at a weekly rent of 2*l*., and occupied the living rooms himself. A notice to quit was served on the sub-tenant in June, 1948, but he did not vacate the shop until early in September. On August 23, the plaintiff's tenancy was determined by a notice to quit served on him by the landlord on August 13. Following the service of that notice the plaintiff, through his solicitors, started negotiations with the landlord, the result of which was that the landlord granted to the plaintiff on October 7, 1948, to operate as from September 29, separate leases of the shop and of the dwelling-house for a term of five years. The rent for the shop was 2*l*. a week and for the dwelling-house 1*l*.

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In the above circumstances the plaintiff brought the present proceedings in the county court to fix the standard rent of shop and dwelling-house at 1*l.* per week. The county court judge gave judgment for the plaintiff, and the defendant, the executrix of the landlord, appealed.

Nigel Robinson for the landlord. The county court judge came to a wrong conclusion. The tenant never became a statutory tenant of the business part of the premises because under the separate lease the shop was no longer controlled. In *Phillips* v. *Hallahan* (1), Bankes, L.J., held that there was nothing in the Rent Restriction Acts to prevent a landlord who had obtained possession of premises, part of which consisted of business premises, letting off that portion as business premises, although if he had let the premises as a whole it would have continued to be within the protection of the Acts. The judge appears to have thought that the principle laid down by Bankes, L.J., and approved by Greer, J., did not apply to the present case because here the tenant was in possession of the whole of the premises. It is submitted that in the circumstances of the present case, where at the instance of the tenant there has been a genuine separation into two tenancies, the principle does apply. The shop is no longer protected by s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939, and the proper rent is 2*l.*, as fixed by the lease.

L. A. Blundell for the tenant. Although there are here two separate documents concerning two separate estates in law, either of which could be assigned, subject to the provisions of the leases, this court should treat the shop as premises let together with the dwelling-house within the meaning of s. 3, sub-s. 3, of the Act of 1939 (2): see *Mann* v. *Merrill* (3). As between the landlord and the tenant, the premises, until the two leases were granted, were let as a whole to the plaintiff, and there was no change afterwards in the facts of the occupancy. The principle laid down in *Phillips* v. *Hallahan* (4) was expressly limited in its application to cases where the landlord was in possession.

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(1) [1925] 1 K. B. 756.

(2) Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 3: "Subject to the provisions of "paragraph (*a*) of the last preceding "sub-section, the application of the "principal Acts, by virtue of this "section, to any dwelling-house shall "not be excluded by reason only that "part of the premises is used as a "shop or office or for business, trade "or professional purposes; and for "the purposes of the Rent and Mort-"gage Interest Restrictions Acts, 1920 "to 1938, as amended by virtue of "this section, any land or premises "let together with a dwelling-house "shall, unless the land or premises so "let consists or consist of agricultural "land exceeding two acres in extent, "be treated as part of the dwelling-"house".

(3) (1945) 114 L. J. (K. B.) 406.

[*Lewis* v. *Purvis* (5); *Wimbush* v. *Cibulia* and *Wimbush* v. *Levinski* (6) also referred to.]

SOMERVELL, L.J., stated the facts and continued:—The tenant now comes before us and says that notwithstanding those two leases he is entitled to have both the shop and dwelling-house for five years at the old rent of 1*l.* The question is whether he is right. The county court judge, for reasons which I will discuss in a moment, came to the conclusion, reluctantly, that the plaintiff was right, and from that decision the landlord appeals.

The first case to which I wish to refer is *Phillips* v. *Hallahan* (7). There the premises, as here, consisted of a shop and a dwelling-house, one building in the ordinary sense. They had been let under one tenancy. When they became vacant in 1923 the landlord let them both to one tenant but under two separate lettings. It was held that the shop portion of the premises, while so let separately, was not within the protection of the Acts. Obviously, if they had been let under one lease, then, by reason of a very familiar provision to which I will refer in a moment, the tenant would have been protected in respect of the shop unless, of course, he had sub-let, when different considerations would apply. Bankes, L.J., said this (8): "The "landlord claimed to recover possession of a shop which she had "let to the tenant. To that claim the tenant answered that the "shop was within the protection of the Act, because it and the "rooms above it constituted a house which at one time was "within the Act, and as there had been no structural alteration "of the premises it was said that they were still within the "protection of the Act". The Divisional Court rejected that view. Bankes, L.J., held that there was "nothing in the Act to "prevent a landlord, who has obtained possession of premises, "part of which consists of business premises, letting off that "portion as business premises, although if he had let the place "as a whole it would have continued to be within the protection "of the Act". With that decision Greer, J., agreed.

The position is somewhat different here, in that the tenant at the time when these two documents were entered into was in occupation of the living part of the premises; and, if one takes the

(4) [1925] 1 K. B. 756.
(5) (1947) 177 L. T. 267.
(6) [1949] 2 K. B. 564.
(7) [1925] 1 K. B. 756.
(8) Ibid. 758.

time when the negotiations were concluded, though not, I think, when they started, he was in possession of the whole of the premises. Prima facie I cannot see how that makes any difference to the principle, but before considering the thing in the abstract I will consider the cases on which Mr. Blundell, for the tenant, relies. The first case is *Mann* v. *Merrill* (9). In that case the argument turned on the provisions of what is now s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939. [His lordship read the section.] Mr. Blundell submits that although we find here two separate documents concerning two separate estates in law, either of which could be assigned subject to the provisions of the leases and the Landlord and Tenant Act, and so on, we should treat the shop as premises let together with the dwelling-house. I think if one read those words in the first instance one might assume that they meant a single document. But that is not so, and two cases, at any rate, to which we have been referred, show that they must, in certain circumstances, receive a wider construction.

In *Mann* v. *Merrill* (9), on February 1, 1938, there was a letting of a house together with agricultural land of just under two acres, which did not take it out of the Rent Act because of the words of s. 3, sub-s. 3. About a year later the landlord let an adjoining piece of agricultural land for a term expiring on the same date. The court held that you took the two leases together, and that as from the date of the second lease there was land let together with a dwelling-house exceeding two acres in extent. One sees, if I may say so, the common sense of that. The deed was later in date. The natural view of what happened was that the landlord was saying: " You have a cottage and a bit of land; " I will give you another bit of land to enjoy with the cottage ". I think that case does not support Mr. Blundell's argument in the present case, because in that case there was no suggestion that the parties were intending, as they were in the present case, under legal advice, to divide the subject-matter which had been originally held under one tenancy into a subject-matter held under two separate tenancies.

Mr. Blundell quite rightly also referred us to *Lewis* v. *Purvis* (10). I need not trouble with it at any length. It was a case in which there were leases—again I think successive leases —of a shop and adjoining house. The circumstances were such that the court held that there was no evidence on which the

(9) 114 L. J. (K. B.) 406.

(10) 177 L. T. 267.

county court judge could come to the conclusion that there was a single letting. It was a case which went the other way.

Then there were two cases heard in this court in 1949, *Wimbush* v. *Cibulia* (11) and *Wimbush* v. *Levinski* (11). In each of the cases there were two lettings made at different times, on weekly tenancies, of rooms in the same house. The lettings consisted of (1.) two first floor rooms, and (2.) the ground floor and basement. The first floor rooms were used in one case for sleeping accommodation and in the other case for the kitchen and living room. All other activities took place in the ground floor and basement. The landlord gave notice to terminate the weekly tenancy of the ground floor and basement, leaving the upstairs rooms unaffected by any notice to quit. The question there was whether the ground floor and basement were a dwelling within the Act, so as to enable the tenant to hold over as a statutory tenant. It was rather a curious case. This court held that it was impossible to hold that the ground floor and basement constituted a separate dwelling within the Rent Acts apart from the first floor rooms where one of the essentials of living was carried on. It was decided that each of the cases must be referred back to the county court judge to decide as a fact whether they were the subject of distinct and separate lettings or whether they should be treated as a combined single letting—to summarize the matter, whether they came within *Mann* v. *Merrill* (12) or *Lewis* v. *Purvis* (13). Those, I think, are the relevant authorities.

In the present case, I think, the history is of importance, though I am not necessarily saying that I should come to a different conclusion if one or other element to which I am going to refer were absent. I think the fact that this man did for a long time sub-let the shop and get 2*l*. a week, which is the sum fixed for the five years' tenancy, is important. It was probably in the landlord's mind and also in the tenant's. It is clear that he has for a period traded in the shop himself under the new lease. He has not been very successful and he may have had in his mind that it would be wise to have a separate lease which he could, if necessary, assign. It is quite plain that the negotiations started on August 18. The plaintiff was then expressing his willingness to pay a larger sum, viz., 3*l*. That was for the whole premises. At some stage, acting under legal advice, they adopted the system of having two tenancies. I have fully in mind, of course, the principle that you cannot contract out of the Rent Restriction Acts.

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(11) [1949] 2 K. B. 564.

(12) 114 L. J. (K. B.) 406.

(13) 177 L. T. 267.

I agree with the decision in *Phillips* v. *Hallahan* (14), that there is nothing in the Rent Restriction Acts which prevents a shop and adjoining living premises from being let separately although they may have at one time been let together. I cannot see why that should not be done as between a landlord and a tenant under a notice to quit or, if they like to agree, without a notice to quit. The fact that up to very near the time when the new lease starts there was a sub-tenant in the shop may have its relevance in coming to that conclusion. The judge referred to *Phillips* v. *Hallahan* (14). He says that the premises " were not " severed as regards lettings when the leases were made. " Different tenants were not in the occupation of the two parts " and the plaintiff was still tenant of the whole premises at a " weekly rent of 1*l.*". He undoubtedly comes to the conclusion that the plaintiff succeeded and, after referring to *Phillips* v. *Hallahan* (14), he said: " If the landlord had been in possession " of the shop and dwelling-house in this case when the leases " were made there would have been freedom of contract ". With respect, I do not follow that. There is no suggestion in the present case that there was not freedom of contract. There is no suggestion that the tenant was intimidated or threatened or cajoled in doing what he did. The two parties, as I have said, were both being advised by solicitors. In respect of the shop the tenant, of course, got considerable advantage. Before, when there was a single weekly lease, if he sub-let the shop it was outside the Act and the landlord might get possession of it. But he now has a five years' lease of the shop which, if he decides that he does not want to trade himself, he can assign. So he gets a considerable advantage out of it. I cannot see anything in the facts or in any authority which compels one to say that because they cover a shop and adjoining premises one must therefore treat the two as let together for the purpose of s. 3, sub-s. 3, when the document shows that the parties plainly had the intention and expressed the intention that they should be let separately.

For these reasons, though I agree it may be in many cases a question of fact, I do not think the county court judge has addressed his mind to the right issue. It seems to me that in this case there is only one possible conclusion, namely, that these premises were not let together but were let separately and the tenant is not entitled to have the rent under the two separate leases reduced to the amount of the standard rent when they were let together. It is true, I think, that he would be entitled either in these or subsequent proceedings to ask the county court judge to apportion the original 1*l.* in respect of the living premises. He has not asked the county court judge to do that in this case and we shall have to consider what will be the proper order to make having regard to that. I think that the appeal must be allowed.

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(14) [1925] 1 K. B. 756.

SINGLETON, L.J. I am of the same opinion, and I propose to add very little to the judgment which has been delivered by my Lord. It is, I think, of great importance that the facts should be ascertained and that the dates of the various happenings should be kept clearly in mind. In the year 1941 the plaintiff became the tenant of No. 17 Bridge Street, Worcester, which was a shop and dwelling-house combined. He paid a weekly rent of 1*l.* Fairly soon he sub-let the shop at a rent of 2*l.* a week and he retained the dwelling-house, or most of it, for his own use. The shop was let to a man named Wilson, who remained in the shop for some years. In the year 1948 Wilson was given notice to quit, but he did not leave until September, 1948. Meantime notice to quit had been given to the tenant by the landlord on August 13, 1948. That notice expired on August 23, 1948. The sub-tenant remained in occupation of the shop, as I have said, until some time in September. It seems to me that if proceedings had been taken by the landlord for possession of the shop in the latter part of August, or early in September, of 1948, the landlord might well have obtained an order for possession of the shop, for it had been sub-let by the tenant and Mr. Wilson remained in it until after the notice to quit given to the tenant had expired.

In those circumstances, there was discussion between landlord and tenant, and that led to correspondence between their respective solicitors. We have not all the correspondence, but there is before the court the letter of August 18, 1948, written by the solicitors then acting for the tenant, to the landlord's solicitors. It is clear that from August 18, 1948, onwards the solicitors for the parties were in negotiation. At that time, as I have said, but for these negotiations the landlord might have obtained an order for possession of the shop, which was not in the occupation of the tenant at all but was in the occupation

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of Wilson. The negotiations resulted in an agreement from which there flowed the leases which bore date October 7, 1948. There are two entirely separate leases, the one which grants a lease of "all that messuage dwelling-house and premises over "and at the rear of a lock-up shop known as No. 17 Bridge Street, "Worcester", and the other in respect of "all that lock-up shop "situated and known as No. 17 Bridge Street, Worcester". Each of them was to run from September 29, 1948, for a term of five years. The result is that the tenant has a lease for five years of a shop in Bridge Street, Worcester, at a rent of 2*l.* a week and a lease of a house at the rent of 1*l.* a week. He is then able to sub-let one without the other. He is in an advantageous position as the result of the negotiations which have taken place between his solicitors and the landlord's solicitors. I appreciate that there can be no contracting out of the Rent Restriction Acts.

At the time when these negotiations were entered into the landlord was in a position in which he might have obtained an order for possession of the shop. Thereafter someone else came on to the scene and apparently took the view that these two leases, separate leases in respect of separate premises, really cover one thing, and that one ought to regard both premises as falling under s. 3, sub-s. 3, of the Act of 1939, so that the shop should be regarded as premises "let together with a dwelling-house". The shop was let separately; it was the subject-matter of a separate lease after negotiations had taken place. I do not see why one should regard the shop as let together with the dwelling-house if the parties, under advice and knowing of the difficulties on both sides, decide that there should be separate lettings of the two premises according to their user, the one as a house and the other as a shop. It was agreed that they should be treated separately; they were during the negotiations occupied separately and by different people. I do not know why parties cannot by their agreement do that which they did.

Mr. Blundell, on behalf of the tenant, submits that what the parties did provides evidence on which the county court judge could find that the shop was premises "let together with "a dwelling-house". I do not think that he came to a finding upon that basis. For myself, though I recognize that the Rent Acts create in some cases a somewhat artificial position, I think it a matter for regret that fairly soon after the parties, separately advised and competently advised, have entered into arrangements of this kind, an effort should be made to set aside that agreement. Both parties knew what they were doing; both parties were advised and both parties determined that it was right and proper to treat these premises as entirely separate. I agree that the appeal should be allowed.

DENNING, L.J. I agree. This is another case, of which we have had many lately, in which a tenant seeks to push to an extreme the advantages conferred on him by the Rent Acts. In this case there was a shop with dwelling rooms above. The tenant at his own request was granted a lease for five years of the shop at 2*l.* a week and another lease for five years of the dwelling rooms at 1*l.* a week. Now he says that the rent which he should pay for the whole is only 1*l.* a week and that he can keep both leases for their full term of five years at the total rent of 1*l.*, apportioned between the two, say 10*s.* a week each. Let me test the position in this way: suppose he sub-lets the shop to a respectable and responsible person, as he is entitled to do, then the shop is clearly outside the Rent Acts. The tenant is under no restriction as to the rent he can charge to the sub-tenant. He can charge 2*l.* a week or more to the sub-tenant for the remainder of the full contractual term of five years. Is he allowed to do this and yet only pay 10*s.* a week to the landlord? I do not believe the Acts compel us to that result. I think it is quite lawful for a landlord and tenant to agree upon separate leases for a shop and dwelling-house, so long as it is not a device to avoid the operation of the Act but is a genuine separation into two tenancies for some good reason, as, for instance, when it is done in order to enable the tenant to dispose of the shop separately from the dwelling-house, if he should thereafter wish to do so. The judges in *Phillips* v. *Hallahan* (14) limited their observations to cases where the landlord had obtained possession; but that was only because that was all they had to decide in that case. The principle extends also to a case where the tenant is in possession of the whole, so long as there is a genuine separation into two tenancies for some good reason. In this case we do not know the precise reason, but there is a letter from the tenant's solicitors to the landlord's solicitors saying: "For reasons which "he has explained to your client, he would like to have a lease "of the premises and is in those circumstances prepared to pay "the considerable increase in the rent now suggested". The first suggestion came from the tenant for his own good reasons. It seems to me that the separation into two leases was a genuine

(14) [1925] 1 K. B. 756.

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separation and is perfectly lawful. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Peacock & Goddard, for Johnstone, Williams & Walker, Nottingham; James Smith.*

A. W. G.

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Somervell, Singleton and Denning, L.JJ.

CRESSWELL *v.* HODGSON.

[Plaint F. 3161.]

Landlord and tenant—Rent restriction—Weekly tenancy—Possession—Suitable alternative accommodation offered at increased rent—Suitability to means of tenant—Landlord's reasons for desiring possession—Reasonableness—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 (*b*).

In considering whether it would be reasonable to make an order for possession of a dwelling-house controlled by the Rent Acts the county court judge is given a very wide discretion. He must look into the effect of such an order on each party and is entitled to take into consideration the fact that the landlord is seeking to make a pecuniary gain.

Appeal from Judge Raleigh Batt, sitting at Stockport county court.

The plaintiff, a builder, was the owner of a dwelling-house, 13 Parksgate Drive, Woodsmoor, Stockport, which was let to the defendant, a police constable, at a rent of 13*s*. 6*d*. a week, plus rates. The plaintiff was also the owner of the dwelling-house 11 Poplar Grove, Stockport, which he had recently built under existing building regulations. The maximum rent at which that house could be let had therefore been fixed at 29*s*. a week, plus rates, and the price for which it could be sold was also controlled by the local authority. The plaintiff, being pressed by his bank, was desirous of obtaining possession of the Parksgate Drive house so that he could sell it, without restriction as to price, as uncontrolled premises. He accordingly gave notice to quit to the defendant and offered him the Poplar Grove house as suitable alternative accommodation. The defendant declined this offer on the ground that the increased rent was not suitable to his means and that the move would involve him in unwarranted expense.

The plaintiff brought the present action for an order for possession under s. 3, sub-s. 1 (*b*), of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1).

The county court judge refused to make an order. He held that the Poplar Grove house offered suitable alternative accommodation, and also, though with some doubt, that the higher rent was suitable to the defendant's means, but he was of opinion that it would nevertheless not be reasonable to make an order for possession. He said that an order in the plaintiff's favour would mean nothing but loss to the defendant and nothing but very substantial gain to the plaintiff, without any loss, sacrifice or disadvantage being suffered by him. When an order meant all gain to one side and all loss to the other it seemed to him that it could not rightly be said to be reasonable inter partes to make it. If the test of reasonableness were not confined inter partes, but regard were had to the general scheme and purpose of the Rent Acts, he thought an order should not be made, since an order ejecting the tenant would mean that, whenever a builder was completing the building of a house, he could buy at a modest price a house let to a protected tenant, force the sitting tenant into the newly erected house at a higher rent, and then sell the vacated premises at a price greatly in excess of the price at which he had bought them. A decision which permitted such a course of conduct would be deplorable and unreasonable.

The plaintiff appealed.

R. H. Mais for the plaintiff. The county court judge, having found that the alternative accommodation offered by the plaintiff was suitable, and that the rent of that alternative accommodation was suitable to the defendant's means, has misdirected

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(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, sub-s. 1: "No order or judgment for the recovery of possession "of any dwelling-house to which the "principal Acts apply or for the "ejectment of a tenant therefrom "shall be made or given unless the "court considers it reasonable to "make such an order or give such a "judgment, and either . . . (*b*) the "court is satisfied that suitable alternative accommodation is available "for the tenant or will be available "for him when the order or judgment "takes effect".

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himself in considering the question of reasonableness. He is not entitled to take into consideration the reasons which a landlord has for seeking possession. The object of the Rent Acts is to protect the tenant and not to penalise the landlord. There is nothing in the Acts which makes it unreasonable to grant possession to a landlord merely because his object is pecuniary gain.

Basil Gerrard for the defendant. In considering the question of reasonableness the judge was entitled to take into account the grave doubts which he had expressed as to the suitability of the rent of the alternative accommodation to the defendant's means. As to the matters which can be taken into account on the question of reasonableness, see observations of McCardie, J., in *Chiverton* v. *Ede* (2).

SOMERVELL, L.J., stated the facts and continued:—The first question is whether the alternative accommodation offered by the plaintiff was reasonably suitable within sub-s. 3 of s. 3. of the Act of 1933, which provides: "Accommodation shall be deemed "to be suitable if it consists of 'premises' . . . (ii) otherwise "reasonably suitable to the means of the tenant and to the needs "of the tenant and his family as regards extent and character". The county court judge, after finding that the other conditions were satisfied, said that he felt considerable doubt whether he ought to come to the conclusion, having regard to the very substantial increase on what he was then paying, that the rent was reasonably suitable to the means of the tenant. However, he decided by a narrow margin that it was, and said: "I am not "prepared to put it on the side of the margin which would hold "a rent of 35*s*. 0*d*. necessarily unsuitable to the means of a man "earning 8*l*. 15*s*. 0*d*.". That, of course, is conclusive on that point.

The judge then went on to consider the question of reasonableness. Mr. Mais submits that he took into account things which, as a matter of law, he ought not to have taken into account. The main thing of which Mr. Mais complains is that the judge took into account the fact that the plaintiff would get considerable pecuniary gain if granted possession, and that that was his sole motive in asking for an order. That matter arises in this way: the plaintiff wanted capital to pay off a bank overdraft. If he sold the house which he had just built the price was controlled, whereas it is suggested that if he could get vacant

(2) [1921] 2 K. B. 30, 44.

possession of the house in which the defendant was living, he would be able to sell that for a larger sum. The judge refers to the fact that the plaintiff's motive is pecuniary gain, and that that is the only motive. The tenant, on the other hand, would have the cost of the removal and the increased rent to pay. On the matter of pecuniary gain, though I do not think he relied on it as essential to his conclusion, the judge pointed out that, taking a wider view, the general purpose of the restriction on prices which could be got for new houses might be defeated if people were able to build a new house, get a tenant out of an old house into it, and then sell the old house at an unrestricted price.

The other matter which Mr. Mais complains of is that in considering reasonableness the judge took into account the fact that he regarded the case as a borderline one so far as the means of the tenant were concerned. I think that, when Parliament gave this overriding discretion to the county court judge and said "You must consider whether it is reasonable to make an order", it gave him a very wide discretion, which it is most undesirable to seek to limit or interfere with. I think the words of the section themselves indicate that the county court judge must look at the effect of the order on each party to it. I do not see how it is possible to consider whether it is reasonable to make an order unless you consider its effect on landlord and tenant, firstly, if you make it, and secondly, if you do not. I do not think we should say anything which restricts the circumstances which the county court judge should take into consideration. I think he is entitled to take into consideration that this is a case where the landlord is making a pecuniary gain. That might in other cases be a fact in the landlord's favour, and it might be thought reasonable that he should be given the chance of making pecuniary gain. In argument I referred to another possible case. Sometimes you might get a case where the landlord's motive is not pecuniary gain, but possibly in order to accommodate a tenant who applies to him, who is less well off than the sitting tenant, and to whose means the house occupied by the defendant is more suitable than the alternative accommodation which is being offered to the sitting tenant. Those are examples of the circumstances which the county court judge has to take into account.

I do not think this is a matter of law. It would not be right to say that the county court judge should exclude from his mind the fact that in his view it is a borderline case. I do not think he is compelled by the Act to decide the thing in watertight compartments. I think he can take all the circumstances together and exercise his discretion in the light of the whole of those circumstances. The county court judge thought that it would assist this court if he split up his decision, but I find nothing in the note of his judgment which leads me to the conclusion that he considered matters which, as a matter of law, he ought not to have considered. He may have given more weight than we should give, or more weight than another county court judge would give, to some matters, but that is not the question here. The question here is whether he has so plainly gone wrong in law that this court should interfere, presumably by way of ordering a new trial. I do not think there is any misdirection shown and, in my opinion, the appeal should be dismissed.

SINGLETON, L.J. I agree that the appeal should be dismissed. All that the county court judge had to consider was the full effect of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. There were two questions which arose: first, was suitable alternative accommodation available for the tenant? On that point the judge, after considerable hesitation, was satisfied that the plaintiff had shown that there was alternative accommodation, suitable as to its position, as to its accommodation, and as to rent. The sole remaining point was that it was not open to the judge to make an order for possession unless he considered it reasonable to make such an order or to give such a judgment. When there has been an appeal to this court on that question of reasonableness it has been said time and again that it is really a question of fact, and that unless the appellant can show that the judge has misdirected himself in some measure this court cannot interfere, for the decision on that question is for the county court judge. It is for him to consider whether he thinks it reasonable to make an order.

Mr. Mais, recognizing that, sought to show this court that the judge had considered matters which he ought not to have considered. He directed attention to the fact that the judge considered that if an order for possession was made it would be all loss for the tenant and all gain for the landlord. Those considerations, Mr. Mais submitted, were not proper considerations for the county court judge. Thereupon I thought it proper to ask him what matters the judge could consider, and he answered that he could consider all the questions which affected the tenant financially or otherwise; and further, that he could consider why the landlord required the accommodation, and also the state of health of both parties. In other words Mr. Mais came down to this position, that the county court judge must consider both sides—the position of the landlord and the position of the tenant. It seems to me that if a county court judge, in a case of this kind, found that the landlord was in dire financial straits—and landlords sometimes are—whereas the tenant was well-to-do, that would be a matter which the county court judge could consider. Equally, if he found that the tenant would be put into grave difficulty by the making of the order whereas the landlord would not be in any difficulty, because he had more means, again I think that is a matter for consideration. In this particular case the tenant was a police officer with a wage of *7l. 5s. 0d.* and a rent allowance of up to 30*s.* 0*d.* a week. The county court judge was told that the rent of the house which was offered as alternative accommodation was 29*s.* 0*d.* a week, plus rates. From that point of view, the tenant, having a rent allowance, was in a much better position than most tenants are, and it may well be that many persons might not have come to the conclusion at which the county court judge arrived. He had all the circumstances before him; he has taken great care about the case. He has put his judgment into writing. The reasons which he gave have been fully examined by Mr. Mais in this court, but I for myself cannot see that the county court judge erred in principle or that there is any mistake of law. It is solely a question of fact for his decision, and though he or someone else might have arrived at another decision I think it is impossible for this court to say that he was wrong, and that is why I agree that the appeal should be dismissed.

DENNING, L.J. The Rent Acts put a restraint upon the exercise by a landlord of his common law right to possession. The restraint is not to be removed unless the county court judge thinks it reasonable. That means, I think, reasonable having regard to the interests of the parties concerned and also reasonable having regard to the interests of the public. In this case the judge found it was not reasonable having regard to the interests of the parties. He also said that in his view it was not reasonable having regard to the interests of the public. He pointed out that it would be undesirable that a builder, who was privileged to build a new dwelling-house, should be allowed, for his own private profit, to turn a tenant out of his present house, by offering him the new house at a higher rent. I think the

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judge was entitled to take that into account, and I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co., for Coppock, Helm, Walmsley, Rhodes & Hyde, Stockport; Dangerfield, Blythe & Co., for Bell, Hough & Hamnett, Stockport.*

A. W. G.

C. A.
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Somervell and Denning, L.JJ., and Vaisey, J.

HARLOW *v.* THE MINISTER OF TRANSPORT AND THE RUGBY PORTLAND CEMENT CO. LD.

Town and country planning—Highways—Closing of highways by Minister of Transport's order—One highway by Regulation and Inclosure (Totternhoe) Provisional Orders Confirmation Act, 1886 (49 *Vict. c. xvi*) "*so far as practicable to be preserved in its present* "*condition*"*—Right of user of others granted to public by same Act—Principle of Generalia specialibus non derogant not applicable —Act of* 1886 *not overridden by Minister's order—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 12, *sub-s.* 2; *s.* 49, *sub-s.* 1; *and s.* 118, *sub-s.* 1*—Stopping Up of Highways (Bedfordshire) (No.* 1) *Order,* 1949 (*S.I.* 1949, *No.* 2130).

The Regulation and Inclosure (Totternhoe) Provisional Orders Confirmation Act, 1886, confirmed the terms of a provisional order submitted by the Lands Commissioners for England, which contained proposals for the regulation of parts of the commons situate in the parish of Totternhoe, Bedfordshire. Among other matters, the provisional order proposed that "so far as may be practicable", the ancient roads or tracks respectively known as "The Drovers' "Way" and "The Icknield Way" be preserved in their present condition, and that there "should be reserved to the inhabitants "of Totternhoe and of the neighbouring towns and villages and the "public generally, at all times, a right of walking over all that "part of the said common which is to be regulated", including, inter alia, greenways known as "The Drovers' Way", "The Wheel-"barrow Green Highway" and other highways.

An application for development permission was made in 1947, for the obtaining of chalk by a company which was granted and led to the Minister of Transport in 1949 making an order under s. 49, sub-s. 1, of the Town and Country Planning Act, 1947, for the stopping up of parts of "The Drovers' Way", "The Wheelbarrow "Green Highway", and other highways on the said part of the said commons. The applicant moved the court under s. 11, sub-s. 2, of the Act of 1947, contending that he was a person aggrieved by the order and that the Minister's order deprived him of his right to walk over the highways stopped up, and that the order was bad in law in that it was contrary to the provisions of the Act of 1866, and that the Minister had no power under the Act of 1947 to override the provisions of that Act. Birkett, J., quashed the order, holding that the applicant could invoke the maxim generalia specialibus non derogant, and that the order was not saved by the provision in s. 118 of the Act of 1947 that the Minister could override any previous Acts of Parliament which had authorized or regulated the "development" (as defined in s. 12 of the Act of 1947) of the land, since such authorization or regulation was not effected by the Act of 1866. On appeal:—

Held, that the relevant provisions in the Act of 1886 were merely directions made to the valuer making his award under the Act, and on its true construction the Act did not override the then existing general legislation for the stopping up of highways, and, therefore, could not be construed as overriding subsequent general legislation. The Minister therefore had power to make the order and the issue under s. 118 of the Act of 1947 did not arise.

Per Somervell, L.J. He was not satisfied that if the issue under s. 118 had arisen he would have come to the same conclusion as that arrived at by the trial judge.

Per Denning, L.J. If the Act of 1886 had specifically and imperatively provided that "The Drovers' Way" should be preserved in its existing condition without any diversion or stopping up, then in that event he did not think that the Minister's order could have overruled it, because he agreed with the trial judge, that the Act of 1886 was not an enactment for authorizing or regulating the development of the land within the meaning of s. 118 of the Act of 1947. "The land" in s. 118 meant the particular piece of land over which the Minister desired to exercise his powers—in this case the soil of "The Drovers' Way".

Decision of Birkett, J. [1950] 2 K. B. 175 reversed.

APPEALS by the defendants from a judgment of Birkett, J., quashing an order made by the Minister of Transport under s. 49 of the Town and Country Planning Act, 1947, stopping up highways (1).

A Private Act intituled the Regulation and Inclosure (Totternhoe) Provisional Orders Confirmation Act, 1886, confirmed the terms of a provisional order, submitted by the Lands Commissioners for England which contained proposals for the regulation of parts of the commons situated in the parish of Totternhoe in the rural district of Luton, Bedfordshire. Among other matters, the provisional order proposed that there "should be

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(1) [1950] 2 K. B. 175.

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"reserved to the inhabitants of Totternhoe and of the neighbouring towns and villages, and the public generally, at all times, "a right of walking over all that part of the said common which "is to be regulated", including, inter alia, three greenways known as "The Drovers' Way", "The Wheelbarrow Green "Highway" and "The Quarry Green Highway". Provision was made that "so far as may be practicable, the ancient roads "or tracks respectively known as 'The Drovers' Way' and the "'Icknield Way' be preserved in their present condition".

On November 19, 1949, the Minister of Transport, purporting to act under the powers conferred on him by s. 49, sub-s. 1, of the Town and Country Planning Act, 1947, made an order known as the Stopping Up of Highways (Bedfordshire) (No. 1) Order, 1949, for the stopping up of parts of "The Drovers' Way", "The Wheelbarrow Green Highway" and other highways with which the Act of 1886 was concerned, and for the provision of new highways by the second defendants, Rugby Portland Cement Co. Ld.

The applicant, Arthur John Harlow, who represented various societies concerned with the preservation of rural amenities, and who had been an objector at the local inquiry held by the direction of the Minister of Transport before the order was made, moved the court, in pursuance of s. 11 of the Act of 1947, as a person aggrieved by the order, for an order quashing the order of 1949, on the ground that by reason of the provisions of the Act of 1886 and of the award made under it and duly confirmed, the Minister was without power under the Town and Country Planning Act, 1947, to make an order to stop up the highways. The first defendant was the Minister of Transport. The application for the development permission which led to the Minister's order was for the obtaining of chalk. It was made by the Rugby Portland Cement Co. Ld., the second defendants, before the Act of 1947 had been passed, but, by s. 77, was to be treated as made under the Act of 1947.

Birkett, J., gave judgment quashing the Minister's order. The Minister and the applicants for development permission appealed.

Rowe, *K.C.*, and *J. P. Ashworth* for the Minister.

Harold Williams, *K.C.*, and *William Harris* for the Rugby Portland Cement Co. Ld.

Erskine Simes, *K.C.*, and *Hornby Steer* for the respondent, Mr. Harlow.

Somervell, L.J. This is an appeal from a decision of Birkett, J., under which he quashed an order made by the Minister of Transport under s. 49 of the Town and Country Planning Act, 1947, by sub-s. 1 of which: "Without prejudice "to the provisions of s. 23 of the Act of 1944, as incorporated "with this Act, or s. 3 of the Acquisition of Land (Authorisation "Procedure) Act, 1946, the Minister of Transport may, if he is "satisfied that it is necessary so to do in order to enable development to be carried out in accordance with planning permission "granted under Part III of this Act or to be carried out by a "government department, by order made in accordance with the "provisions of the Sixth Schedule to this Act authorize the "stopping up or diversion of any highway". Sub-section 4 provides that any order made under this section may include, inter alia, provisions requiring any persons specified in the order (*a*) "to pay, or to make contributions in respect of, the cost of "doing any work provided for by the order".

The order in question, the Stopping Up of Highways (Bedfordshire) (No. 1) Order, 1949, recites the relevant parts of s. 49. It recites that the Minister is so satisfied "as regards the high-"ways consisting of the greenways and footpaths in the rural "district of Luton in the county of Bedford . . . which are "specified in Part I of the Schedule to this order". Then it continues: "It appears to the Minister to be expedient that "provision should be made for the provision of the highways "consisting of the greenways (hereinafter referred to as 'the "'new highways') which are specified in part II of the schedule "to this order". The Minister's order continues: "Whereas "the provisions of the sixth schedule to the Act . . . have been "complied with", and then he stops up the old highways and says that new highways are to be provided by the Rugby Portland Cement Co. Ld., the company which, with the Ministry of Transport, were defendants to the application before the High Court, and that they are to provide the cost of providing the new highways.

Part I of the schedule to the order deals with the highways to be stopped up. There is The Drovers' Way and The Wheelbarrow Green Highway, and other highways with which, for reasons which will appear, we are not concerned. Part II of the schedule deals with the new highways. We have a map which shows what was to be done. Broadly speaking, the old highways were to be stopped up in a certain area not of any great size, and alternative highways were to be provided, which meant a somewhat longer walk for those who wanted to get from the place where a highway was stopped up at one end to the place where it was stopped up at the other. The application for the development permission, which led to this action, was for the obtaining of chalk, and was made before the Act of 1947 was passed. However, under s. 77 of the Act of 1947—there is no doubt or dispute as to this—it has to be treated as made under the Act of 1947.

The notice of motion by the applicant, a Mr. Harlow—and there is no question that he is a proper applicant—is made under s. 11, sub-s. 2, of the Act, which provides that within a period of six weeks after the making of an order of this kind persons aggrieved can challenge it in the courts, and can question the validity of such an order before the courts. The grounds on which the applicant contended that he is aggrieved and that this highway order is not within the powers of the Minister are: " that the said highway order deprives the applicant of his right " to walk over the highways set out in part I of the schedule " thereof and that the said highway order is bad in law in that " it is contrary to the provisions of the Regulation and Inclosure " (Totternhoe) Provisional Orders Confirmation Act, 1886, and " the award made thereunder and that the Minister has no power " under the Town and Country Planning Act, 1947, or otherwise, " to override the aforesaid statutory provisions ".

The first question, therefore, it seems to me, is whether the Act of 1886 is overridden by the Minister's order. The principle invoked is a familiar one—generalia specialibus non derogant—and Birkett, J., has set it out in a citation from the case of *Seward* v. " *Vera Cruz* " (2). The passage which he quotes is from the speech of Lord Selborne (3): " Now if anything be " certain it is this, that where there are general words in a later " Act capable of reasonable and sensible application without " extending them to subjects specially dealt with by earlier legis" lation, you are not to hold that earlier and special legislation " indirectly repealed, altered, or derogated from merely by force " of such general words, without any indication of a particular " intention to do so ". The main argument, as it would seem from the judgment below and the greater part of the argument here, proceeded on the basis that the Minister's order did repeal or derogate from the Act of 1886. On that basis the question arose whether s. 118 of the Town and Country Planning Act, 1947, was a good answer. Section 118 provides that: "(1) For "the avoidance of doubt it is hereby declared that the provisions "of this Act, and any restrictions or powers thereby imposed or "conferred in relation to land, apply and may be exercised in "relation to any land notwithstanding that provision is made by "any enactment in force at the passing of this Act, or by any "local Act passed at any time during the present Session of "Parliament, for authorizing or regulating any development of "the land". The definition of the word "enactment" in s. 119 is: "'enactment' includes an enactment in any local or "private Act of Parliament, and an order, rule, regulation, by-"law or scheme made under an Act of Parliament". We are dealing, as will appear, with a Private Act confirming a provisional order under the Commons Act, 1876, which led, in accordance with the familiar procedure, to an award which is referred to in the notice of motion, which I have read, made by the valuer. It was conceded on behalf of the applicant that he could not rely on anything except what was in the confirmed provisional order, that is to say, that if the only conflict was between the order and something in the award he could not invoke with regard to that the principle formulated by Lord Selborne in *Seward's* case (2), which I have quoted. The award would not have been seen and approved by Parliament, and the basis of the principle is that Parliament in the one case intended a special thing and the general intention in the later Act ought not to be regarded as overriding that special intention.

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(2) (1884) 10 App. Cas. 59.

(3) Ibid., 68.

With regard to the word "development" in s. 118, that is defined and it has the meaning assigned to it by s. 12 of the Act of 1947, so in considering what enactments authorize or regulate any development of the land we are referred to s. 12, sub-s. 2, which gives this wide definition of development: "In this Act, "except where the context otherwise requires, the expression "'development' means the carrying out of building, engineer-"ing, mining or other operations in, on, over, or under land, or "the making of any material change in the use of any buildings "or other land: Provided that the following operations or uses "of land shall not be deemed for the purposes of this Act to "involve development of the land". I need only refer to two of them: "(*b*) the carrying out by a local highway authority of any "works required for the maintenance or improvement of a road,

(2) 10 App. Cas. 59.

" being works carried out on land within the boundaries of the " road ". That proviso, I think, confirms the conclusion to which, for myself, I would have come, that the making of a new road would be development. Then there is proviso (*e*), " the use of any land for the purposes of agriculture or forestry " (including afforestation), and the use for any of those purposes " of any building occupied together with land so used ", and that also is not to constitute development.

The first question, therefore, as I see it, is whether the Act of 1886 entitles the applicant to invoke that principle. I have come to the conclusion that the applicant does not get over this, his first difficulty. I can state my reasons fairly shortly. The Act is, " An Act to confirm the provisional order for the regulation of the commons, and the provisional order for the inclosure " of the common fields, situated in the parish of Totternhoe ". It recites that the Land Commissioners, in pursuance of the Inclosure Acts, issued a provisional order in respect of inclosures, and it recites that a Committee of the House of Commons recommended that the same should be confirmed, and continues: " And whereas the said regulation and inclosure cannot be proceeded with without the previous authority of Parliament ", then it is enacted that: " (1.) The provisional order of regulation " and the provisional order of inclosure set forth in the schedule " to this Act are hereby confirmed ". I should say that the area with which we are concerned is that part of the area which was regulated as a common and not that part of the area which was inclosed. Then we come to the schedule. There are the ordinary recitals, and it refers to a map which was deposited. It provides: " That the part of the said common to be regulated be " the tracts known as the Dunstable Downs, Whipsnade Heath " (so far as the same lies within the said parish), the cow common " (except as hereinafter mentioned), and the Castle Hill, all of " which are coloured light green on the map hereinbefore referred " to, and also the several pieces of land, baulks, and driftways " which are coloured dark green on the said map, and also, as " part of the cow common, the three pieces of common field land " which are severed by and lie to the north of the London and " North-Western Railway, and are coloured yellow on the said " map, in lieu of which that portion of the cow common which " is severed by and lies to the south of the said railway, and is " coloured pink on the said map, together with so much of the " cow common at its eastern end as with the said portion shall, " in the judgment of the said Commissioners, be equal in value "to the three pieces of common field land aforesaid, shall be "included in the provisional order for inclosure as part of the "common field land".

I think that before I come to the provisions of the order on which the matter turns, I should refer very briefly to this. There is no suggestion that anything in this order is ultra vires the Commons Act, 1876. It is perhaps just worth referring to the fact that the Commons Act, 1876, in setting out what can be done in the regulation of a common, does, by s. 5, which deals with improvements, say: "The improvement of a common com-"prises, for the purposes of this Act all or any of the following "things, that is to say:—(1.) the draining, manuring or levelling "of the common". Then under s. 7 there is a provision that "In any provisional order in relation to a common, the Inclosure "Commissioners shall, in considering the expediency of the "application, take into consideration the question whether such "application will be for the benefit of the neighbourhood and "shall, with a view to such benefit, insert in any such order "such of the following terms and conditions (in this Act referred "to as statutory provisions for the benefit of the neighbourhood) "as are applicable to the case, that is to say that . . . (4.) that "carriage roads, bridle paths and footpaths over such common "are to be set out in such directions as may appear most com-"modious . . .". That would appear to give the commissioners power with regard to highways.

I now come back to the provisional order for the regulation of the Totternhoe common, the Schedule to the Act of 1886. It provides: "That, for 'improvement' the following provisions be "put in force; that is to say provisions for"—inter alia, what I have just read from s. 5 of the Commons Act, 1876—"the "draining, manuring, and levelling of such parts of the said "common as may be found necessary", and continues to deal with other matters, such as the planting of trees and so on, which are not material on either argument. Further on it provides: "That, with a view to the benefit of the neighbourhood, "the following provisions be made part of the terms and condi-"tions of this order, that is to say: That Totternhoe Castle, and "the ancient earthworks connected therewith, and the five "tumuli on the Dunstable Downs, be preserved and maintained "in their present state"—then this is the important provision—"that, so far as may be practicable, the ancient roads or tracks "respectively known as 'The Drovers' Way' and 'The Icknield "'Way' be preserved in their present condition". In respect of The Drovers' Way, which is one of the ways mentioned in Part I of the First Schedule to the Order of 1949, that is the provision which is relied upon. I myself think that the proper construction of that provision and the proper intention which the words convey, is and is only to limit the power of the valuer, when he comes to make his award. He has the general powers with regard to carriageways which I have read from the Act, but this is to tell him that though he has those powers so far as practicable these ancient ways are to be preserved in their present condition. I can find no indication in these words to take The Drovers' Way out of the general law as to highways as it existed at the time or as it might thereafter be enacted by Parliament. I do not myself think that that provision in this order would have precluded anybody from making an application to quarter sessions to stop up The Drovers' Way under the procedure of the Highways Act, 1835. It is a short point and I do not know that I can elaborate it, but this would seem to me its effect and its intent. It is intended to limit what is to be done in the award, though, even on that basis, it is not categorical; it is only "so far as may be practicable". It is a direction to the valuer as to how he is to exercise his powers and in no sense purports to, nor does it, take these highways out of the general law.

The Wheelbarrow Green Highway is not mentioned by name but it comes in under the following words: "That there be "reserved to the inhabitants of Totternhoe, and of the neighbour-"ing towns and villages, and the public generally, at all times, a "right of walking over all that part of the said common which is "to be regulated, with the exception of the cow common, and "that, in addition, there be reserved as aforesaid a right of play-"ing games". That brings in the definition which I have already read. The pieces in question are "the several pieces of "land, baulks and driftways which are coloured dark green". Whereas if one reads this with the map, the words, I think, rather suggest that the public were to have a general right of walking in any direction over a considerable area, when one looks at the parts marked dark green in certain cases the right was over a way or footpath. That, so far as I have been able to put the two provisions together, is where it affects the Wheelbarrow Green Highway. But the same conclusion which I have expressed in regard to The Drovers' Way would also, in my opinion, apply; that is to say, again it is a direction or an indication to the valuer as to how he is to exercise his powers, and I can find no words there which would take any of the ways or the places where there is a right of walking referred to in that paragraph out of the general law as to highways.

Now, on this view, the point decided by the trial judge does not arise. But it is right, since I am not satisfied that if that point had arisen I should have come to the same conclusion as the judge, that I should just refer to what he said about it. He said (4): "I have come to the conclusion that the order of the "Minister closing these highways ought not to have been made. "I am satisfied that the meaning of 'development' in s. 118, "as defined in s. 12, must be adhered to closely, and I cannot "think that the 'development' which took place under the "Act of 1886 was in any sense the 'carrying out of building, "'engineering, mining or other operations in, on, over, or under "'land', which is the first head of the definition or that as "under the second head, it amounted to 'the making of any "'material change in the use of the land' in question. On the "evidence before me it would not appear that any material "change or, in fact, any change at all had been made in the "three highways specified in the Minister's order which would "constitute 'development' within the meaning of 'develop-"'ment' as defined in s. 12". The map, I understand, only appeared at the last moment and it may be that in this court we were rather more fully informed than was the judge with regard to what exactly had happened. But I personally was satisfied that these ways or parts of them were, under the directions in this provisional order confirmed by Parliament, diverted and, possibly in one place, continued, and, I think, there would be a forcible argument that if this authorized the making of a way in a new place, and if it was shown that this was done, it would be development. There were other and wider arguments put forward suggesting that this provisional order fell within s. 118, even if there had been no alteration in the ancient way. I do not propose to consider them because they are complicated and no decision on them is necessary in this case.

For the reasons which I have given I think this appeal should be allowed.

DENNING, L.J. In the old days in order to stop up or divert a highway it was necessary to go through the procedure laid down in the Highways Act, 1835, and most of us remember the rather complicated set of documents which an application to quarter sessions entailed. Nowadays the Minister of Transport can do it, so long as he goes through the procedure laid down by the Town and Country Planning Act, 1947. In so doing he can override any previous Acts of Parliament which have authorized or regulated the " development " of the land. But he cannot override the specific provisions of any other Acts. If he desires to stop up or divert an ancient highway, such as a Roman road, which has been left untouched by Parliament, he can do so by going through the necessary drill. If he desires to stop up or divert a modern highway, such as a trunk road which has been made under the authority of Parliament, he can likewise do so, because the Acts which authorize the making of new roads are undoubtedly Acts which authorize the development of the land on which they are made. But it is said that he cannot stop up or divert this ancient Drovers' Way, because Parliament has ordered it to be preserved " so far as may be practicable ".

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(4) [1950] 2 K. B. 175, 181–2.

I wish to confine what I have to say to the small strip which is undoubtedly part of the old Drovers' Way. If the Act of 1886 had specifically and imperatively provided that The Drovers' Way should be preserved in its existing condition without any diversion or stopping up, then I do not think the Minister could have overruled it, because I quite agree with my brother Birkett that the Act of 1886 was not an enactment for authorizing or regulating the development of the land within the meaning of s. 118 of the Act of 1947. I think that " the land " in that section means the particular piece of land over which the Minister desires to exercise his powers, that is, in this case, the soil of the old Drovers' Way. I do not think that any part of the Act of 1886 or the schedule thereto authorized or regulated the development of that piece of soil. It simply preserved its existing use as a public way. The order did no doubt contain a general power to drain and level land which would include the soil of The Drovers' Way, but that would only be maintenance, not development.

I think, however, that this appeal should be allowed on a point which was not specifically argued before Birkett, J. In my opinion the Act of 1886 was not so precise and definite about The Drovers' Way that it took precedence over any general Act. I am quite sure that Parliament did not intend that The Drovers' Way should be exempt from diversion under the old Highways Act. All that it intended was that " so far as practicable " it

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Harlow v. Minister of Transport and Rugby Portland Cement Co. Ld.

should be preserved. That left it subject to the general legislation for the stopping up or diversion of highways. If this special Act did not override the existing general legislation it cannot be supposed to override subsequent general legislation.

In my opinion, therefore, the powers of the Minister to stop up or divert highways extend not only to ancient common law highways and to new statutory highways but also to highways set out or confirmed under the Commons and Inclosures Acts. The appeal should be allowed.

Vaisey, J. I agree that this appeal succeeds. As we are differing from the judge in the court below I ought perhaps to try to add a few words of my own. But, finding myself in complete accord with everything that has fallen from my Lords, and being fully satisfied that there is no part of the ground which they have not completely covered, I content myself with expressing my concurrence in the order proposed.

Appeals allowed.

Solicitors: *The Treasury Solicitor; Braby & Waller, for M. N. Smith, Rugby; Dixon, Martell & Co.*

C. G. M.

REX v. BALL.

C. C. A.
1951
Feb. 19.

Lord Goddard, C.J., Hilbery and Devlin, JJ.

Criminal law—False pretences—Obtaining of valuable security—Cheque signed by husband—Wife induced to part with cheque by false pretence—Whether security obtained from wife—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 32, *sub-s.* 1.

A person may be properly charged with obtaining a thing by false pretences from another named person notwithstanding that that other was not the owner of the thing, provided that he had authority from the owner to transfer the property in it.

Where, therefore, the defendant fraudulently induced a wife to complete in his favour and hand to him a blank cheque signed by her husband:—

Held, that the defendant was properly charged with obtaining the cheque by false pretences from the wife, because she had the authority of her husband to pass the property in it to the defendant, and she did so.

APPEAL against conviction.

On October 5, 1950, the appellant called at the vicarage at Bradford-on-Avon and told the vicar that he could sell him about 10*l*. worth of peat at a cheap rate of 3*l*. per 1,000 blocks. The vicar ordered that peat and left with his wife a cheque form signed by him, the name of the payee and the amount not being filled in, to be filled in and handed to the appellant on delivery of the peat. Later the same day the appellant called again at the vicarage and told the vicar's wife that he had delivered the peat, about 3,000 blocks. The wife accordingly filled in the appropriate amount and handed to him the cheque. In fact the appellant had delivered only 980 blocks of peat.

The appellant was indicted under s. 32, sub-s. 1, of the Larceny Act, 1916 (1), on a count charging that he "on October 5, "1950, with intent to defraud, obtained from Mary Gwyn Galsworthy [the vicar's wife] a certain valuable security, namely, "a cheque for 10*l*., drawn by William Donald Galsworthy [the "vicar] on the Midland Bank Ld., Bradford-on-Avon, by falsely "pretending that he had delivered to the said William Donald "Galsworthy peat blocks to the value of 10*l*., calculated at the "rate of 3*l*. per 1,000 blocks". The appellant was tried at Wiltshire quarter sessions and convicted.

He now appealed.

Molony for the appellant. The appellant did not "obtain" the cheque from the vicar's wife, but from the vicar.

[LORD GODDARD, C.J. Does not "obtains" in s. 32, sub-s. 1, of the Larceny Act, 1916, mean "gets"?]

No. It means "gets the ownership of".

[LORD GODDARD, C.J. But the wife had the authority of her husband to pass the ownership of the cheque.]

Yes, but not her ownership. She could only pass her husband's ownership of it. An agent of the owner of a thing may be able to confer the ownership of it on a third party, but the third party then "obtains" it from the principal, not from the agent. The offence of obtaining by false pretences involves the taking of the ownership of a thing as opposed to its possession:

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(1) Larceny Act, 1916, s. 32: "Every person who by any false pretence (1) with intent to defraud, "obtains from any other person any "chattel, money, or valuable security, "or causes or procures any money to "be paid, or any chattel or valuable "security to be delivered to himself "or to any other person for the use "or benefit or on account of himself "or any other person . . . shall be "guilty of a misdemeanour . . .".

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Reg. v. *Prince* (2). "Obtains" means "takes the ownership". That can only be taken from the owner. The appellant should have been charged either with obtaining the cheque from the vicar or with causing or procuring it to be delivered to him by the wife.

H. S. Russell, for the prosecution, was not called on to argue.

Lord Goddard, C.J., delivered the judgment of the court. After stating the facts he continued:—Section 32, sub-s. 1, of the Larceny Act, 1916, does not say "obtains from the owner": it says "obtains from any other person". There is no doubt that "obtains" means obtains the property and not merely possession, and the obtaining must not for this purpose be under such circumstances as to amount to larceny. The offence is by false pretences to obtain any valuable security from any other person. In this case the appellant obtained the cheque from the person named in the indictment, that is, the vicar's wife; she was the vicar's agent and had authority from the vicar to pass the property in the cheque, and she did pass the property in it. Therefore the appellant obtained the cheque and obtained the property in it from her—the person to whom he had made a false representation, and he did it with intent to deceive. Therefore all the necessary elements of the offence of obtaining by false pretences appeared to be present.

The argument on behalf of the appellant was that he obtained the cheque from the vicar. It may be that the indictment would have been equally good if it had alleged that he obtained it from the vicar. The statute does not make it necessary to allege that the defendant obtained it from the owner, but that he obtained it from any other person, and that person includes a person who had authority to pass the property.

The case is really, in my opinion, concluded by the following observations of Blackburn, J., in *Reg.* v. *Prince* (3): "However, as the law now stands, if the owner intended the property "to pass, though he would not so have intended had he known "the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where "the servant has an authority co-equal with his master's, and "parts with his master's property, such property cannot be said "to be stolen, inasmuch as the servant intends to part with the "property in it". That is exactly what happened here. The

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(2) (1868) L. R. 1 C. C. R. 150.

(3) Ibid. 155.

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servant (that is, the wife) intended to part with the property in the cheque and had authority co-equal with the authority of the owner to pass the property. Bovill, C.J., who gave judgment before Blackburn, J., said in that case (4): "Here, however, it "seems to me that the bank clerk had a general authority to part "with both the property in and possession of his master's money "on receiving what he believed to be a genuine order, and that "as he did so part with both the property in and possession of "the note in question the offence committed by Mrs. Allen falls "within the cases which make it a false pretence".

Here it seems to me that the vicar's wife had authority to part with the property in the cheque, and she did part with the property in it to the appellant in circumstances which made him the owner of the cheque. He got the property in it and he got it by false pretences. Accordingly, in my opinion, no objection can be taken to the indictment and this point fails. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Pennington & Son for Lemon, Humphreys, Parker and Mather, Swindon; Wansbroughs, Robinson, Tayler and Taylor, Devizes.*

R. P. C.

(4) L. R. 1 C. C. R. 154.

C. A.

1950
Nov. 29.

Somervell, Jenkins and Birkett, L.JJ.

DOWNIE *v.* TURNER AND ANOTHER.

[Plaint No. J. P. 292.]

Landlord and tenant—Lease—Restrictive covenants—Alleged breach—Subletting of part of demised house—User otherwise than as a private dwelling-house—Forfeiture—Waiver.

Where a lease contains covenants against (a) underletting the demised premises or any part thereof without the previous consent in writing of the landlord, (b) user of the demised premises otherwise than as a private dwelling-house, and there has been an underletting without consent—contrary to the first covenant—of part of the demised premises for residential purposes, it cannot be alleged that, although the breach of the first covenant has been waived,

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[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

nevertheless there has been a breach of the second covenant which may be continuous and thus not waived—since both the underletting and the alleged user of the house otherwise than as a private dwelling-house arose from the sub-tenancy.

The test whether a breach of covenant is or is not continuous does not depend solely upon whether it remains in the tenant's power to discontinue it, for an important element in the matter is the landlord's knowledge—actual or to be presumed—at the time of accepting rent.

Quære, whether an underletting of part of a house to be used as a dwelling-house by the sub-tenant is a breach of the covenant not to use the demised premises for any other purpose than as a private dwelling-house.

Walrond v. *Hawkins* (1875) L. R. 10 C. P. 342 applied.

APPEAL from Judge Hurst, sitting at Croydon county court.

By an agreement in writing dated November 9, 1940, the plaintiff let to the first defendant a house (within the Rent Restriction Acts) owned by the plaintiff, for a term of one year commencing on November 11, 1940, at a rent of thirty-five shillings a week. The tenancy was terminable by either party at the expiration of the term reserved by the agreement, or at the expiration of any week thereafter, by the party wishing to determine giving to the other four weeks' previous notice in writing. The agreement contained the following terms, among others: "[the tenant] will not during such tenancy underlet the "premises or any part thereof without the previous consent in "writing of the landlord; such consent shall not be unreasonably "withheld to a good tenant. . . . And the tenant agrees that "he will not use the said premises for any other purpose than as a private dwelling-house . . .".

In February, 1946, in breach of the second undertaking, it was alleged, the tenant sublet part of the house to the second defendant.

In October, 1949, the landlord served a notice to quit upon the tenant, and sometime in November, 1949, the tenant served a similar notice on the sub-tenant, and after its expiration the tenant remained in possession as statutory tenant, and the sub-tenant also continued in possession. In April, 1950, the landlord served a notice of forfeiture on the tenant under s. 146 of the Law of Property Act, 1925. That notice was ignored, and proceedings for possession were instituted in the county court against the tenant and sub-tenant.

It was not disputed that the landlord became aware in September, 1949, of the subletting and accepted rent thereafter until

February, 1950, and he conceded that the acceptance of rent after September, 1949, and the service of the notice to quit in October, 1949, had operated as a waiver in respect of the subletting; but it was contended that there had been a breach of the second covenant, inasmuch as the house was now in effect two dwelling-houses; that that breach was a continuous breach; and that therefore it had not been waived.

The county court judge gave judgment for the tenant, holding that the breach was not continuous since it was not within the tenant's power to discontinue it.

The plaintiff appealed.

L. A. Blundell for the landlord. (His argument is sufficiently indicated in the judgment of Somervell, L.J.)

N. Lermon for the tenant was not called upon to argue.

SOMERVELL, L.J. [after stating the facts]. The tenant relies on waiver. As the judge stated in his judgment (and it is not disputed that it is accurate), " Mr. Blundell on behalf of the " plaintiff concedes that the plaintiff's acceptance of rent has " operated as a waiver in respect of the unlawful underletting, " but he contends that the breach of covenant ' not to use the " ' said premises for any other purpose than as a private dwelling- " ' house ' is continuous, and has therefore not been waived. In " these circumstances the only issue between the parties is " whether or no the last-mentioned breach is ' continuous ' in " character ". He referred to the statement of Rigby, L.J., in *Penton* v. *Barnett* (1), a case of non-repair, where it was held that a breach of a general covenant to keep in repair was a continuing breach, that: " If there had not been a recurring breach, " but something which had happened once and for all, the state " of things might have been different " (2).

In the county court the present case proceeded on the basis that the subletting to and the occupation by the sub-tenant was a breach of the covenant not to use the premises for a purpose other than that of a private dwelling-house. I will refer to this aspect of the case later in my judgment. It is, of course, plain that if what happened amounted to a breach of the covenant not to use the premises for a purpose other than that of a private dwelling-house, that breach arose from the sub-tenancy and the sub-tenant's occupation under it. It would not be enough, as I

(1) [1898] 1 Q. B. 276. (2) Ibid. 281.

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pointed out in the course of the argument, if a breach of that covenant was to be relied on simply to allege that the sub-tenant and his wife were in the house. A tenant does not cease to use his house as a private dwelling-house because he has a married couple in it. If there was a breach of that covenant it must be because the sub-tenant was given under his sublease exclusive possession of a part of the house. If, as is conceded, the subletting was done once and for all, prima facie the breach that would have to be alleged of this other covenant is something which had happened once and for all.

Mr. Blundell submits, with regard to the second covenant, that the continued occupation by the sub-tenant is an essential ingredient in the breach of the subletting covenant, whereas there would be a breach of the subletting covenant even if he were not in occupation. I think that that distinction is too fine a one on which to base a decision that the breach, if any, of the second covenant is continuous rather than something done once and for all. Both the breach of covenant against subletting and the alleged user of the house otherwise than as a private dwelling-house arose in my opinion from the sub-tenancy, and in my opinion it is impossible in law to distinguish for this purpose and say that the one was done once for all and the other was a continuing breach.

The court was referred to a number of cases, but they are not of much assistance. In *Atkin* v. *Rose* (3), and several of the other cases cited, the covenant, breach of which was said to be continuous, was a covenant not to exercise a particular trade. In *Atkin* v. *Rose* (3) the lease contained a covenant by a person that he would not use or exercise or "permit or suffer" any other person to use or exercise in or upon the demised premises any trade or business other than that of a bag manufacturer. Thus there was a restriction of use to a particular trade. Nevertheless the business of a hairdresser was carried on, and there was some evidence that the landlord knew that this was so, though there was no evidence that he knew, as the fact was, that the person carrying on the hairdresser's business was a sublessee.

Those cases do not really help, because the covenants there concern quite different subject-matters. But here there is a sublease of part of a house for ordinary occupation as a dwelling-house by the sub-tenant, and it is sought to bring that subletting within the general words of a wider covenant which is obviously primarily aimed against business use. It seems to me impossible to differentiate between the two things and say that the subletting was done once and for all, but that the occupation of the subtenant is continuous. The county court judge did not approach the matter on the basis of something which had been done once and for all. After referring to *Walrond* v. *Hawkins* (4), he said that the best way of defining what was continuous was to say it must be "something which still remains within the tenant's "power to discontinue". I am not sure that that is quite right. I think that it perhaps disregards what is very important in these cases, that is, the lessor's actual knowledge, or the knowledge which he must be presumed to have at the time when he accepts the rent.

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(3) [1923] 1 Ch. 522.

However, that it is a factor to be borne in mind in considering whether the breach is continuous or not is, in my view, established by the cases. The authorities show that there is no single formula which can be applied in all cases. In *Griffin* v. *Tomkins* (5) premises were in breach of contract used for trading purposes, and the landlord accepted rent with, at any rate, some knowledge of the breach. The covenant in question was a covenant against permitting or suffering. Lush, J., in the course of his judgment said (6): "I think this case opens a further con"sideration. I think it is competent to the defendant to show, "as was shown here, that he had let that person in under a lease "for several years, because the question is whether he permitted "or suffered him to carry on business, which would seem to "import voluntary acts. According to the decision in the Court "of Common Pleas before mentioned [*Walrond* v. *Hawkins* (7)], "where there is a subsisting tenancy at the time which he could "not put an end to, he cannot be said to have permitted or have "suffered it. I think, therefore, when he showed that he had "already granted a lease for several years, and that the waiver "was committed after that lease was granted, and after some "interest was known to have existed in the tenant, that assumes "a tenancy at all events during the continuance of that lease, "and down to such a time as the lessee is able again to enter "under that lease". That expression of the law shows, I think, that the power to discontinue is an element in considering whether the breach is continuous.

The effect of *Walrond* v. *Hawkins* (7), as summarized by

(4) (1875) L. R. 10 C. P. 342.
(5) (1880) 42 L. T. 359.
(6) Ibid. 361.
(7) (1875) L. R. 10 C. P. 342.

Bramwell, L.J., in *Lawrie* v. *Lees* (8), is this: " The covenant " in that case was that the lessee was not to assign or demise to " or permit any other person to occupy the premises or any part " thereof without the consent of the lessor. What the Court of " Common Pleas said was this, ' What the lessee has done is a " ' demise, and it is a breach of the covenant not to demise, but " ' the lessor has elected not to treat it as a breach or forfeiture, " ' and he cannot say also that the lessee has broken the other " ' covenant that he would not permit any other person to " ' occupy ' ".

That seems to me to negative precisely what Mr. Blundell is seeking to establish here. He admits that the breach of covenant against sub-tenancy has been waived, and he is seeking in effect to rely on the other covenant as one which says that the tenant must not allow a third party to occupy part of the house as a private dwelling-house. That reinforces the decision I have come to. I therefore conclude that the judge was right and there is no ground for thinking that he misdirected himself or applied the wrong test.

With regard to the other point to which I referred earlier in my judgment, I have myself considerable doubt whether on the construction of this lease a sub-tenancy of part of the house to be used as a dwelling-house by the sub-tenant is a breach of the covenant whereby the tenant agrees that he will not use the said premises for any other purpose than as a private dwelling-house. The court was referred to cases where, subject to similar covenants, a lessee had let out a house in tenements. It seems to me plain that in these circumstances the lessee is not using the premises as a dwelling-house; he is conducting in it the business of letting out flats or tenements. In *Barton* v. *Keeble* (9) Eve, J., applied the same principle to a single subletting of three rooms. It is to be noted that the covenant there was in a long lease and did not contain a covenant such as that here allowing subletting with consent. The existence of such a covenant in my opinion affects the construction of the lease in the present case. Of course, if the tenant sublets for some purpose other than that of a private dwelling-house, then both covenants are broken, but where the tenant is subletting for the purpose of a private dwelling-house it seems contrary to good sense to say that that is a breach of the covenant against subletting which, however, provides for consent being given, which will make the subletting not a breach, and also to say it is a breach of the second covenant which has no such provision for consent. I am therefore inclined to think that the subletting of part of a house for use as a dwelling-house comes under the covenant against subletting and is taken out, as it were, even if it might otherwise have been within it, of the second covenant against using the premises for purposes other than those of a private dwelling-house. I think that the appeal should be dismissed.

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(8) (1880) 14 Ch. D. 249, 262.

(9) [1928] Ch. 517.

JENKINS, L.J. I agree that the appeal fails. Notwithstanding his argument, Mr. Blundell has by no means succeeded in satisfying me that the judge did not come to a perfectly correct conclusion in this case. I share the doubt expressed by my Lord whether in this particular tenancy agreement, containing as it does a covenant against subletting without consent, the covenant against using the premises for any purpose other than as a private dwelling-house extends to a subletting of part of the house for purely residential purposes. If it does so extend there is no doubt that curious results might ensue. In the first place I apprehend that a subletting with consent could not be relied on as a breach of the covenant as to user. But that is not the only possible case. The covenant is not to underlet without the consent in writing of the landlord, and "such consent shall not "be unreasonably withheld to a good tenant". The effect of that qualification would be this: the tenant, being desirous of underletting, produces a prospective underlessee whom he claims to be a good tenant, and asks for consent to underlet to that person. If the landlord withholds his consent the tenant then (at his peril it is true) can underlet to that person and has not committed a breach of the covenant in so doing if he can show that the sub-tenant is in fact a good tenant and that the landlord in fact withheld his consent unreasonably. I ask myself whether in those circumstances the underletting so effected, without any breach of the covenant against underletting, would in itself nevertheless expose the tenant to a forfeiture because it technically involved the use of the premises for a purpose other than as a private dwelling-house, even though the purpose of the subletting and the use in fact made of the part sublet was purely residential.

But be that as it may, I am content, for the purposes of the present case, to assume that a mere subletting of part of the premises for residential purposes would in itself constitute a breach of the covenant as to user. Even so, it seems to me that

Mr. Blundell's contention cannot succeed. It follows from the effect which he attributes to the covenant as to user, and which I for the sake of argument assume it to have, that the subletting of part of the premises ex necessitate, and of itself and without any other act on the tenant's part, was a breach of the covenant as to user, even though the subletting was for purely residential purposes. That being the position, what was the effect of the landlord's receipt of rent after September 9, 1949, by which date he admittedly had notice of the subletting? The landlord knew that there was a subletting of part of the premises to the second defendant. He knew that under the terms of the tenancy agreement that subletting was a breach of the covenant against underletting, and also of itself necessarily constituted a breach of the covenant as to user which must automatically continue so long as the sub-tenancy lasted. That being the state of his knowledge, he received rent under the tenancy agreement, thereby confirming the tenancy notwithstanding the breach of covenant constituted by the underletting. In those circumstances, I think the conclusion is inevitable that the landlord must be taken to have waived, not merely the breach of the covenant against underletting itself, but also the breach of the covenant as to user so far as that breach was inseparable from and would necessarily continue during the existence of, and merely by virtue of the existence of, the subletting, the breach constituted by which he had waived. I agree with my Lord that what was said by Bramwell, L.J., in *Lawrie* v. *Lees* (10) about the effect of *Walrond* v. *Hawkins* (11) is precisely in point in the present case. The landlord, having waived the breach constituted by the underletting, cannot rely on the continuing character of the tenant's breach of the other covenant, namely, the covenant as to user brought about by the mere fact of that same subletting, so as to claim a forfeiture notwithstanding his waiver of the breach constituted by the underletting itself. The truth is that the two breaches are no more than different aspects of one and the same act. If the act in one aspect of it is waived as an available breach of covenant, it seems to me it is necessarily waived as an available breach in its other aspect also. Accordingly, I agree that the appeal fails.

BIRKETT, L.J. I agree fully with the judgments which have been given and their reasoning. But as I have felt, as Mr.

(10) 14 Ch. D. 249.

(11) L. R. 10 C. P. 342.

Blundell's argument has proceeded, that we were concerned with rather artificial and unreal distinctions, I will give the reasons why I come to the same conclusions as my brethren.

The essence of the case lies in this: in the lease of November 9, 1940, there were two covenants, among others, by the tenant. The first covenant was not to underlet without the previous consent in writing of the landlord. By the second covenant, "the tenant agrees he will not use the said premises for any "other purpose than as a private dwelling-house".

Mr. Blundell's argument was that here there were two complete and separate covenants and that there had been two quite separate and distinct breaches of covenant: a breach of the covenant not to underlet without consent and an equally clear breach of the covenant as to user. The artificial and unreal nature of the matter consists, in my opinion, in this, that the act which is really complained of, from which everything else follows, was the actual underletting. The underletting and the user by the sub-tenant of part of the house as a dwelling-house seem to me to be one and indivisible. I share the doubt which has been expressed whether a subletting for residential purposes is a breach of the contract not to use the demised premises other than as a private dwelling-house; but I will proceed on the footing that it is.

Mr. Blundell says, with regard to the first distinct covenant and the first distinct breach, that admittedly there has been a waiver by the acceptance of rent with the knowledge that the sub-tenants were living on the premises. Therefore the landlord has no effective claim with regard to that breach of covenant. But he says that with regard to the other equally distinct covenant as to user, that is distinguished by the fact that there is a continuing breach as distinct from the breach of the covenant not to sublet which occurred once and for all. He said that that continuing breach had not been waived by the acceptance of rent. On that, the county court judge said: "the only issue between "the parties is whether or no the last-mentioned breach"—as to user—"is 'continuous' in character. Having considered" the cases "it seems to me that the touchstone to distinguish "between continuous and non-continuous breaches of covenant "is to ascertain whether the breach 'is something which took "place 'once for all' (per Rigby, L.J., in *Penton* v. *Barnett* (12))

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(12) [1898] 1 Q. B. 276, 281.

"or something which still remains within the tenant's power to "discontinue".

With regard to the sentence "within the tenant's power to "discontinue" Mr. Blundell argued forcibly that, if that were the test, then it was within the tenant's power to discontinue, for he could provide alternative accommodation. He could possibly persuade the sub-tenant to go, or, in the last and most desperate resort, he could go himself. No doubt in a proper case, indeed in this case, the tenant's ability to discontinue the breach is a fact which has to be considered, but it is not of itself conclusive. My own clear view about this question is that it is impossible in this case to make that clear line of demarcation which Mr. Blundell contended for between the two covenants, the covenant not to sublet and the covenant not to use otherwise than as a private dwelling-house. I am of opinion that there was not merely a waiver of the first covenant not to sublet, but that equally, by the same act, there was a waiver of the second covenant with regard to user, if indeed the subletting was a breach at the same time of that covenant. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Gilbert, Clarke & Gilbert; W. H. Matthews & Co.*

LLOYD *v.* E. LEE LD.

1951
Jan. 24.

Lord Goddard C.J., Humphreys and Devlin, JJ.

Road traffic—Goods vehicle—"C" licence—Condition forbidding carriage of goods for hire or reward—Vehicle used by person other than licence-holder for carriage of goods for hire or reward—Failure to fix identity certificate—Both offences committed by licence-holder—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 2, *sub-ss.* 4 *and* 5, *and s.* 9*—Goods Vehicles (Licences and Prohibitions) Regulations,* 1936 (*St. R. & O.*, 1936, *No.* 269), *reg.* 12, *sub-reg.* 2.

By s. 2, sub-s. 4, of the Road and Rail Traffic Act, 1933: "A private carrier's licence (. . . 'a C licence') shall entitle the "holder thereof to use the authorized vehicle for the carriage of "goods . . . subject to the condition that no . . . authorized "vehicle shall be used for the carriage of goods for hire or reward".

By s. 9: " . . . any person who fails to comply with any condition "of a licence held by him shall be guilty of an offence. . . ".

By reg. 12 of the Goods Vehicles (Licences and Prohibitions) Regulations, 1936: "the holder of a licence shall during such time

[Reported by MRS. F. N. BUCHER, Barrister-at-Law.]

"as any vehicle is used under the licence cause the appropriate "identity certificate to be affixed to that vehicle . . .".

The true construction of s. 2, sub-s. 4, of the Act of 1933 is that a vehicle shall not be used by anybody in breach of a condition of its licence: there is no implied limitation in the sub-section that the prohibition is applicable only to use of the vehicle by the licence-holder himself. Accordingly, the offence created by s. 9 is not confined to the specified failure by the licence-holder himself. The conditions subject to which a licence is issued are in the licence itself, and if a condition is not complied with by anybody it is the licence-holder who is responsible for that fact, and who will through his contravention of s. 2, sub-s. 4, be guilty of the offence created by s. 9.

If the appropriate identity certificate referred to in reg. 12 of the Regulations of 1936 is not affixed to a vehicle, an offence is committed by the licence-holder even though the vehicle was not at the time being used by him. Moreover, on the true construction of reg. 12, it is required not merely that the certificate should be affixed to the vehicle at some time during the licensing period, but that it should be kept affixed to it throughout that period.

Where, therefore, the defendant company allowed their motor lorry, in respect of which they held a C licence, to be used by an associated company for the carriage of goods for hire or reward, no part of which was received by the defendant company, and the appropriate identity certificate was not, on the occasion of that use by the associated company, affixed to the vehicle:—

Held, that the defendant company, although not themselves then using the vehicle, and although they received no reward for its use, were nevertheless guilty of contravening s. 2, sub-s. 4, of the Act of 1933, and, in addition, reg. 12 of the Regulations of 1936.

CASE STATED by Southport justices.

At a court of summary jurisdiction sitting at Southport, two informations were preferred by William Herbert Lloyd against the defendants, E. Lee Ld., in the following terms:—

"(1.) On May 8, 1950, at Southport the defendants unlaw- "fully did fail to comply with a certain condition of a licence "held by them under Part I of the Road and Rail Traffic Act, "1933, namely, the condition that the authorized vehicle should "not be used for the carriage of goods for hire or reward contrary "to s. 9 of the Act (1); and

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(1) Road and Rail Traffic Act, 1933, s. 2, sub-s. 4: "A private "carrier's licence (in this Part of "this Act referred to as 'a C "licence') shall entitle the holder "thereof to use the authorised "vehicle for the carriage of goods "for or in connection with any trade "or business carried on by him, sub- "ject to the condition that no vehicle "which is for the time being an "authorised vehicle shall be used for "the carriage of goods for hire or "reward". "Authorised vehicle" is defined by s. 2, sub-s. 5 of that Act as ". . . in relation to any "licence a vehicle authorised to be "used thereunder". Section 9: ". . . any person who fails to com- "ply with any condition of a licence "held by him shall be guilty of an "offence under this Part of this Act".

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"(2.) On May 8, 1950, at Southport the defendants unlawfully acted in contravention of a certain requirement of No. 12 of the Goods Vehicles (Licences and Prohibitions) Regulations, 1936 (2) . . . that is to say being the holders of a carrier's licence did fail during the time the holders were using a vehicle under the said licence to cause the identity certificate appropriate to the vehicle to be affixed and carried on the said vehicle in the manner required".

At the hearing of the informations the following facts were proved or admitted:—The defendant company were the owners of a goods motor vehicle in respect of which they had obtained a C licence. On May 8, 1950, another company, Enterprise Transport Ld. (who occupied premises adjacent to the defendant company's and had some business connexions with them) used the defendant company's C-licensed vehicle for the carriage of goods for hire or reward. On that date no identity certificate was affixed to the vehicle. No hire or reward was paid by the associated company to the defendants for the use of the vehicle, and the vehicle was not being used by the defendants on that date.

It was contended for the prosecutor that the use of the vehicle by a third person for the carriage of goods for reward constituted a failure on the part of the defendant company to comply with the condition under which the vehicle was licensed since the vehicle was an authorized C licence vehicle.

It was contended for the defendant company that, as they themselves were not using the vehicle under the licence, and were not being remunerated for its use, there was no failure to comply with the condition under which the vehicle was licensed, and also no contravention of the Goods Vehicles (Licences and Prohibitions) Regulations. The magistrates accepted those contentions and dismissed both informations.

The prosecutor appealed.

A. E. Baucher for the prosecutor.

J. R. C. Samuel-Gibbon for the defendant company.

The arguments are sufficiently summarized in the judgment of Devlin, J.

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(2) Goods Vehicles (Licences and Prohibitions) Regulations, 1936, reg. 12, (2.): "The holder of a licence shall during such time as any vehicle is used under the licence cause the appropriate identity certificate to be affixed to that vehicle . . . and at all times whilst the vehicle is being so used the certificate shall be readily legible . . .".

DEVLIN, J. [after stating the facts:] The points which have been taken upon the construction of s. 2, sub-s. 4, of the Act of 1933 were these. It was said, first of all, that, on the true construction of the sub-section (which contains the statutory condition of the "C" licence which is said to have been broken) the use of the vehicle must, if it is to constitute a breach of condition by the licence-holder, be a use by the licence-holder, and that, as the vehicle was at the time being used by Enterprise Transport Ld., the associated company, it was not a use by the holder of the licence.

Sub-section 4 contains no such limitation. [His lordship read the sub-section, and continued:] The phrase "shall be used" is quite wide and means shall be used by anybody. We are invited to read into it the limitation "shall be used by the holder "of the licence". There is no warrant for reading those words into the Act, and, indeed, it seems to me that the second part of sub-s. 4 is deliberately put into the passive voice in order to contrast with the first part. The first part is saying what the holder is entitled to do, and it would have been very simple for the draftsman to go on to say that he is not entitled to do anything else with it. Plainly the limiting condition is intended to be wider than that, and for that reason it is expressed in the passive voice and it is provided that the vehicle shall not be used in this particular way.

Section 9 of the Act of 1933 reads: "any person who fails to "comply with any condition of a licence held by him shall be "guilty of an offence" (the charge is that the licence-holders, the defendants, have failed to comply with the condition that the vehicle shall not be used for the carriage of goods for hire or reward), and the next argument—it is really the same point over again—is that only the person who actually uses the vehicle can fail to comply with the condition. I think that there is no substance in that: the condition is in the licence; and if the condition is not complied with the licence-holder is responsible for it.

Finally on this point, it is said that, as it was found as a fact by the justices that no hire or reward, although earned by Enterprise Transport Ld., was paid over to the respondent company, therefore the defendant company have committed no offence. That argument involves, as I understand it, the broad proposition that it would be quite lawful for any person who had a goods vehicle, but did not propose to license it, to carry the goods of his friends all round the country provided that he did not do so for hire or reward, and provided that he carried no goods of his own, without obtaining a licence or paying duty at all. Whether that proposition be one which is acceptable as a matter of common sense or not, the matter comes back again to the exact wording of sub-s. 4 of s. 2. This vehicle was being used for the carriage of goods for hire or reward, and, again, it is impossible to read into those plain words the limitation that a person who uses it must pay over the hire and reward to the holder of the licence or, alternatively, pay him some other hire or reward for the use of the vehicle. I think it is quite plain that an offence has been committed under this sub-section.

By the second information the defendants are charged with a breach of the Goods Vehicles (Licences and Prohibitions) Regulations, 1936. The case finds that the identity certificate appropriate to the vehicle was not affixed and carried on it in the required manner; but it also finds that the vehicle was not being used by the defendants on the material occasion. That latter finding is the basis of the first argument that has been addressed to us, that is, that the regulation is broken only if the holder of the licence is the person who is using the vehicle. There, again, it seems to me that the regulation is perfectly plain as a matter of construction. Again the relevant words are in the passive voice: " The holder of a licence shall during such time as any " vehicle *is used* under the licence . . .". It does not say " is " used by the holder ". It is argued that the holder is the only person who can use the vehicle *under* the licence, and that therefore we ought to construe this regulation so narrowly as to produce the result that, if a vehicle is being used while it is licensed, but in breach of the licence, the regulation does not apply. I do not think that that is the common-sense construction to put on the regulation.

The second point taken on the second information is that the justices have not followed in their finding, any more than did the information strictly follow, the wording of the regulation. They have added to the word " affixed " the words " and carried ", and their finding is that the identity certificate was not " affixed " and carried " on the vehicle in the required manner. The words " and carried on it " are, in my view, quite superfluous: the finding that the certificate was not affixed is sufficient to show that the offence was proved. If I have understood the argument rightly, it was further developed by saying that the only duty cast on the holder was to affix the licence at any time during the licensed period and that, once he had affixed it, the holder had discharged the whole duty cast upon him and need do nothing to see that it was kept affixed. But that, again, seems to me to be quite contrary to the common sense of the regulation. If the certificate is to be affixed during the licensed period, that means that it is to be kept affixed during that time. The word "during" is sufficient to show that; it would be really almost absurd to suppose that if at some time during the licensed period the identity certificate were affixed the regulation would not have been broken if it were taken off again.

For these reasons it seems quite plain that the justices were wrong in accepting the submission of the defence that there was no case for the defence to answer. On the facts which they set out in their case—and it does not appear that there are any other facts which the defence propose to add—it seems to me quite plain that an offence has been committed against both the section and the regulation referred to in the informations; and the case will accordingly go back to the justices with a direction to convict.

HUMPHREYS, J. I agree.

LORD GODDARD, C.J. I agree with the judgment which my brother Devlin has delivered, but I want to add this: when these cases do go back to the justices they are not to consider that these were other than perfectly deliberate breaches of the law. They were not technical offences: they were deliberately committed. If two companies who are associated in business together think that one company may use the vehicles of the other when it is convenient without committing offences in breach of the conditions in the licences, the sooner they understand their mistake the better. I only want to emphasize that the justices would not be right in considering that these offences, which have been proved here beyond peradventure, were technical offences.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co., for the Town Clerk, Southport; Vizard, Oldham, Crowder & Cash, for Henry Backhouse & Son, Blackburn.*

ABBOTT *v.* LONDON COUNTY COUNCIL.

1951
Feb. 8.

McNair, J.

[1949 A. 2115.]

Affirmed
[1951] 2 K. B. 907

Local government—Superannuation—Pension—Transfer of local government officer to same work with London Passenger Transport Board—Pension from superannuation fund of local authority—Whether local authority empowered to make increase under Pensions (Increase) Acts, 1944 *and* 1947*—London Passenger Transport Act,* 1933 (23 *Geo.* 5, *c.* 14), *s.* 80, *sub-s.* 9*—Pensions (Increase) Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 21), *s.* 1, *sub-s.* 1; *Sch. I, Pt. II, para.* 1*—Pensions (Increase) Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 7).

By the Pensions (Increase) Act, 1944, s. 1, sub-ss. 1 and 7, read with Sch. I, Pt. II, para. 1, "a pension payable by any local "authority solely in respect of local government service" must be increased by a specified amount.

A woman employed in a tramway undertaking by a local authority was a member of their superannuation fund. In 1933 she became transferred from their employment to that of the London Passenger Transport Board by the London Passenger Transport Act, 1933. She continued as a servant of the board to do similar work, and continued as a member of the local authority's fund, until 1938, when she retired. She was thenceforward duly paid a pension by the local authority.

On her claim for an increase of pension under the Act of 1944:—

Held, that she was not entitled to the increase, since her pension was not payable "solely in respect of local government service", notwithstanding the provision by s. 80, sub-s. 9, of the Act of 1933, that "the provisions of any enactment . . . by which" such a "fund "is regulated shall" continue to apply, for the Act of 1944 was not one regulating the fund, and notwithstanding the provision in s. 80, sub-s. 9, of the Act of 1933, that a person "shall be entitled to the "same benefits, rights and privileges" to which he would have been entitled had he remained in service with the authority, because those words related only to benefits, rights and privileges arising under any enactment, scheme, or rule or regulation, regulating the fund.

Semble. Section 80, sub-s. 9, entitles a transferred officer or servant of a local authority to the benefit of any enactment, scheme or rule or regulation notwithstanding that it was not in force at the time of the transfer, provided that it regulates the fund in question.

ACTION.

From 1909 to July 1, 1933, the plaintiff was employed as a servant of the London County Council (the defendants) in their tramway undertaking and was a member of their superannuation fund. By virtue of s. 73, sub-s. 2, of the London Passenger

Transport Act, 1933 (1), the plaintiff on July 1, 1933, became a servant of the London Passenger Transport Board. She continued to do work similar to that which she had formerly done for the defendants. She continued to be a servant of the London Passenger Transport Board, and a member of the London County Council's superannuation fund, until she retired, on the grounds of ill-health, in August, 1938.

On retirement the plaintiff became entitled to a pension of 86*l.* a year from that superannuation fund, which pension the defendants duly paid to her.

The Pensions (Increase) Acts, 1944 and 1947 (2), provided for

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(1) London Passenger Transport Act, 1933, s. 73, sub-s. 3: "No existing officer or servant" of a local authority transferred to and becoming an officer or servant of the board by sub-s. 2 "shall, without his consent, be by reason of such transfer in any worse position in respect to the conditions of his service as a whole as compared with the conditions of service formerly obtaining with respect to him and, in determining whether an officer or servant is, or is not, in a worse position, regard shall be had to all relevant considerations, including . . . pension, superannuation, . . .".

Section 80, sub-s. 9: Such a person who was a member of any superannuation fund set up by the authority "may so long as he remains an officer or servant of the board continue to be a member of that fund and . . . , while he so continues to be a member, the provisions of any enactment or scheme or any rule or regulation by which that fund is regulated shall, so far as respects him, continue to apply to the local authority, and he shall be entitled to the same benefits, rights and privileges and subject to the same obligations, whether obtaining legally or by customary practice, as he would have been entitled or subject to if he had remained an officer or servant of the authority".

(2) Pensions (Increase) Act, 1944, s. 1, sub-s. 1: "Subject to the provisions of this section, a pension specified in Sch. I to this Act may, in respect of any period after December 31, 1943, be increased by the pension authority by an amount calculated in accordance with the provisions of Sch. II to this Act".

Sub-section 7: "Where any such pension as is specified in Part II of Sch. I to this Act may be increased under the provisions of this section, it shall be the duty of the pension authority to increase the pension in accordance with those provisions".

Section 5, sub-s. 2: "Where any such pension as is specified in para. 1 of Part II of Sch. I to this Act is increased under the provisions of this Act, the cost of the increase shall be defrayed by the pension authority. Provided that where the pension authority are not the last employing authority, the last employing authority shall reimburse the cost of the increase to the pension authority".

Section 8, sub-s. 3: ". . . 'Pension authority' means . . . the authority by whom the pension is payable".

Schedule I to the Act is entitled "Pensions which may be increased under this Act" and includes (Part II, para. 1): "A pension payable by any local authority solely in respect of local government service. For the purposes of this paragraph, the expression 'local government service' means service under any local authority, any service which, by virtue of s. 2 or s. 3 of the Local Government (Emergency Provisions) Act, 1916, or by virtue of sub-s. 3 of s. 12 of the Local the increase of certain pensions, and the plaintiff claimed that she was entitled to the benefit of those Acts. The defendants denied that, and they continued to pay her only 86*l.* a year.

The plaintiff accordingly brought this action for a declaration that the pension which the defendants were paying her was a pension specified in Sch. I to the Pensions (Increase) Act, 1944; that the defendants were empowered to increase such a pension in accordance with the Pensions (Increase) Acts, 1944 and 1947; and that she was entitled to be paid those increases. She further claimed payment of such increases as were due to her under those Acts, or an order directing the defendants to hear and determine her claim in accordance with the Acts of 1944 and 1947.

M. R. Nicholas for the plaintiff. The plaintiff is entitled to the same benefit of the Pensions (Increase) Acts, 1944 and 1947, as she would have received had she continued in the service of the defendants during the period while she was in fact employed by the London Passenger Transport Board. The London Passenger Transport Act, 1933, s. 73, sub-s. 3, provides that such a person is not to be in any worse position by reason of his transfer to the board. The plaintiff relies in particular on s. 80 of that Act and on sub-ss. 9, 10 and 11 of that section. Had she remained in the service of the defendants until her retirement in August, 1938, she would clearly have qualified for and been entitled to an increase in her pension: see the Pensions (Increase) Act, 1944, s. 1, sub-ss. 1 and 7; Sch. I, Part II, para. 1. Her pension would then clearly have been "a pension "payable by any local authority solely in respect of local government service" within the meaning of Sch. I, Part II, para. 1, and, on the coming into force of the Acts of 1944 and 1947, the defendants would have been bound to increase her pension to the extent provided for by those Acts. Therefore in the events which have occurred she is entitled to the same increase of pension by virtue of the Act of 1933.

"Government Superannuation Act, "1937, or by virtue of the Local "Government Staffs (War Service) "Act, 1939, is, for superannuation "purposes, treated as service under a "local authority, and any service "which, by virtue of sub-s. 1 of s. 1 "of the Local Government Superannuation Act, 1939, is to be "treated as service for the purposes "of the Local Government Superannuation Act, 1937; the said "expression includes any such service "as aforesaid notwithstanding that "the local authority concerned have "ceased to exist".

H. E. Francis for the defendants. The pension paid to the plaintiff is clearly not one falling within the words of Sch. I to the Act of 1944, Part II, para. 1, or any other provision of that Schedule. Accordingly the defendants are neither empowered nor bound by s. 1 of the Act of 1944 to pay the increase of pension claimed to her. There is nothing in the Act of 1933 to vary the plain effect of the words of the Act of 1944 or to extend the scope of Sch. I, Part II, para. 1. In particular neither s. 73, sub-s. 3, nor s. 80, sub-ss. 9, 10 or 11, of the Act of 1933, can apply in the events which have happened.

Nicholas replied.

McNair, J. This case raises an interesting and difficult question of construction arising under the London Passenger Transport Act, 1933, and the Pensions (Increase) Acts, 1944 and 1947.

[His Lordship stated the facts, and continued:] The plaintiff had been a contributory member of the defendants' superannuation fund since the beginning of her service with them and she remained such a member, under the provisions of the Act of 1933, until the date of her retirement. The question which is raised in this action is whether the plaintiff is entitled, by the Acts of 1944 and 1947, to the increase of pension which she claims.

The power to pay an increased pension is contained in the Act of 1944. The material provisions are s. 1, sub-ss. 1 and 7, and Sch. I, Part II, para. 1. [His Lordship then read them.] The first question which arises is whether the pension which she claims to have increased can be said to be " a pension payable " . . . solely in respect of local government service " within the meaning of Sch. I, Part II, para. 1, inasmuch as the service which gave rise to that pension was, in fact, partly service with the defendant local authority under whom she first served, and partly under the London Passenger Transport Board under whom she served after the date of her transfer. On behalf of the defendants it is submitted that whatever may be the effect of the Act of 1933, that provision of the Act of 1944 is quite plain in its terms and, so far as is relevant, confines the pensions in respect of which increases can be made to pensions payable by the local authority solely in respect of local government service.

It is further submitted that by reason of the definition, contained in that paragraph, of the words " local government " service ", it is impossible to include in " local government " service " any form of service other than a form of service which falls within the precise words of that definition. The words of that definition show that local government service is defined to include, and to include only, service of three different characters: first, actual service under a local authority; secondly, any service which by virtue of s. 2 or s. 3 of the Local Government (Emergency Provisions) Act, 1916, or by virtue of s. 12, sub-s. 3, of the Local Government Superannuation Act, 1937, or by virtue of the Local Government Staffs (War Service) Act, 1939, is, for superannuation purposes, treated as service under a local authority; and, thirdly, any service which by virtue of sub-s. 1 of s. 1 of the Local Government Superannuation Act, 1939, is to be treated as service for the purposes of the Local Government Superannuation Act, 1937.

In my judgment, it is clear that "local government service" in para. 1 is so limited that the only pensions which a local authority may increase under it are pensions which become payable solely in respect of local government service in one of those three classes. On the facts here it is also plain that the pension which the plaintiff seeks to have increased was not a pension payable solely in respect of local government service in the sense described, since the pension was admittedly in part payable in respect of her service as a transferred officer or servant under the London Passenger Transport Board. Accordingly, unless there is anything in the Act of 1933 which compels me to adopt some other construction of Sch. I, Part II, para. 1, to the Act of 1944, it seems to me that the defendants are right in their contention that this pension is one in respect of which they have no power to grant any increase.

I turn to the London Passenger Transport Act, 1933, to see whether there is in that Act any clear provision which compels me to take a contrary view, bearing in mind that if there is a plain conflict between two statutes the latter statute, in this case that of 1944, must be given effect to as though it impliedly repealed the earlier statute. The sections of the Act of 1933 which are relied upon are all contained in Part VII which covers staff and superannuation. The first relevant section is s. 73, which provides for the transfer of officers and servants solely or mainly occupied in transferred undertakings, of which the plaintiff was admittedly one. [His Lordship then read sub-s. 3 of that section, and continued:] It is said that inasmuch as, if the plaintiff had remained in the service of the local authority until her retirement, she would undoubtedly have qualified for an increase in her pension under the Act of 1944, she is, or may be, prejudiced by her transfer to the board. But if any such prejudice does arise, then there is provision in s. 73, sub-s. 4, of the Act of 1933, for a reference to an arbitrator to assess the amount of compensation to be payable in that event by the board.

But more strictly material are the provisions of s. 80 of the Act of 1933, relating to the superannuation funds. In particular, reliance is placed on sub-ss. 9, 10 and 11. Sub-s. 9, on which much of the argument before me has been based, is in these terms: [His Lordship read it]. That sub-section, in terms, is concerned with transferred officers during the period in which they remain in the service of the board; it is not, in terms, concerned with their position after their retirement. But it is useful to consider that position; if I were satisfied that those provisions applied literally to the plaintiff if she had remained in the board's service until the date of the coming into force of the Act of 1944, she would have gone a long way towards satisfying me that her claim was well founded.

Two points are taken on the construction of this sub-section against the plaintiff's contentions. First, it is said that its effect is to continue in favour of the transferred officer the rights and privileges arising under any enactment, scheme or rule or regulation by which the local authority's fund is regulated only in so far as it was in force at the date of the transfer. Secondly, it is said that, however that may be, the Pensions (Increase) Acts, 1944 and 1947, are not enactments by which the local authority's fund is regulated.

As to the first objection, I do not feel that it is necessary for me to express any concluded view on it, although the balance of my mind is in favour of the view that the words in the sub-section are apt to apply, and attract to the transferred officer, the provisions of any enactment, scheme, or rule or regulation regulating the fund even though it was not in force at the time of the transfer. It seems to me that that construction is preferable in view of the fact that such rights are conferred by the sub-section on the transferred officer as long as he continues to be a member of the fund, thereby indicating to my mind that, as the protection of the enactment, scheme, or rule or regulation is to extend to him during the whole period of his membership, it need not be one which was in force when the act of transfer took place. Any other construction would really involve that if an amendment to the enactment, scheme, or rule or regulation were made after the date of the transfer there would be at least two different classes of persons having different kinds of right in the fund.

As I say, I do not think it necessary to form a concluded view on that, because it seems to me that it is reasonably plain that the Pensions (Increase) Acts, 1944 and 1947, are not, within the meaning of this sub-section, enactments which regulate the local authority's fund. Enactments which regulate the defendant council's fund are, no doubt, the enactments which are set out at the outset of the scheme for establishing the fund, and they are enactments which regulate the statutory rights which the contributors and the members have against the fund. The Pensions (Increase) Acts, do not, as it seems to me, regulate any superannuation fund at all, but provide that the local authority shall be entitled to increase the pensions if certain conditions are complied with—a right altogether outside the fund.

Support for that conclusion can, I think, be found in s. 5 of the Act of 1944, which concerns the financial provisions and prescribes how these increases to the pension are to be defrayed. In the case of pensions specified in Part I of Sch. I to the Act, namely, those which are payable out of public funds, sub-s. 1 provides that the initial expenditure shall be defrayed out of moneys provided by Parliament; but by sub-s. 2, in the case of a pension specified in para. 1 of Part II of Sch. I (which the pension now in question is said to be), " the cost of the increase " shall be defrayed by the pension authority ". It seems to me that a provision which states that an increase of pension shall be defrayed by the pension authority—which by the definition in s. 8, sub-s. 3, means " the authority by whom the pension is " payable "—is not a provision regulating the fund within the meaning of sub-s. 9 of s. 80 of the Act of 1933. Accordingly, in my judgment, the plaintiff cannot claim the benefit of the Acts of 1944 and 1947 by reliance on the words of sub-s. 9.

But the plaintiff relies also on the concluding words of that sub-section, which provide that a transferred officer " shall be " entitled to the same benefits, rights and privileges and subject " to the same obligations, whether obtaining legally or by customary practice, as he would have been entitled or subject to " if he had remained an officer or servant of the authority ". It is said, putting the case at its broadest, that on the admitted facts it is plain that the plaintiff, if she had remained in the service of the defendant council until her retirement, would have become entitled to an increase of pension under the Act of 1944 as soon as that Act came into force. It seems to me, however, that such a construction is putting altogether too broad a meaning on the concluding words of sub-s. 9, and that they must be construed as relating only to the subject-matter of the earlier part of that sub-section, and can only mean that the transferred officer shall be entitled to the same benefits, rights and privileges arising under enactments, schemes, or rules or regulations regulating the fund as he would have been entitled or subject to if he had remained an officer of the authority. To say that those words in that sub-section entitle the pensioner in all cases to the same treatment as he would have received if he had remained an officer or servant of the authority seems to me to involve altogether too loose and too wide a construction of that sub-section.

Finally I would say this: if there be any conflict between the provisions of the Act of 1933 and that of 1944, it seems to me that the words of the relevant provisions of the Act of 1944 are so plain and unambiguous that effect must be given to them rather than to those of the Act of 1933. I have already referred to the definition in para. 1 of Part II of Sch. I to the Act of 1944 as showing how limited is the class of pension which may be increased, and I think that my opinion is reinforced by two other provisions of that Act and one of the Act of 1947. The first is the provision in s. 5, sub-s. 2, of the Act of 1944, which, in effect, provides that, where the pensionable service has partly been in the service of one local authority and partly in the service of another local authority, the pension is to be paid by the last employing authority with a right of reimbursement from the earlier such authority. Secondly, there is a provision in s. 4 of the Act which enables His Majesty by Order in Council, in effect, to apply the Act to certain other classes of pension not specified in Part II of Sch. I to the Act; a use of that power might avoid the apparent anomaly which has been stressed on behalf of the plaintiff that this Act, on the defendants' construction, apparently discriminates against a limited class. A similar provision is to be found in the Act of 1947, which, by s. 5, sub-s. 1, enables the Treasury to "make regulations empowering any person or "body of persons specified in the regulations to pay the like "increases of pensions payable by them or in respect of pensions "otherwise payable by reference to service with them or to such "service and other service, as would be payable if those pensions "were pensions specified in Sch. I to the" Act of 1944. Without expressing any concluded view upon the matter, it seems to me that if there is any anomaly affecting this particular claimant which requires to be overcome, it can be met under one or other of those provisions.

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But the basis of my judgment is that the Act of 1944 in clear terms—so far as it is relevant to the present case—limits the power of a local authority to pay an increase of a pension to the case of a pension which is payable solely in respect of local government service; and that on the admitted facts I have come to the conclusion that the pension that the plaintiff was drawing cannot be said to be a pension payable solely in respect of local government service.

Accordingly in my judgment the plaintiff's claim fails.

Judgment for the defendants.

Solicitors: *Rexworthy, Bonser & Wadkin; J. H. Pawlyn.*

R. P. C.

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Lord Goddard, C.J., Humphreys and Devlin, JJ.

Criminal law—Mens rea—Road traffic—Express carriage—Use without road service licence—Special occasion—Non-compliance with condition—Previous advertisement of journey—Whether knowledge by defendant essential ingredient of offence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61, *sub-ss.* 1 (*b*) *and* 2; *s.* 72, *sub-ss.* 1 *and* 10—*Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 25, *sub-s.* 1 (*a*) (*b*) (*c*) (*d*) (*e*) (*f*) *and* (*g*).

Although by s. 72 of the Road Traffic Act, 1930, it is prima facie an offence to use a motor-vehicle to carry a private party of passengers at separate fares on a special occasion without a road service licence where there has been a breach of a condition of s. 25, sub-s. 1, of the Road Traffic Act, 1934, the person charged can excuse himself by establishing that the breach was committed without his knowledge or connivance by a person over whom he had no control.

A women's guild organized an outing and arranged with a company, who carried on the business of operating motor-coaches, to convey in a motor-coach a party at a fixed price per person. The organizer of the outing caused to be exhibited in a shop an advertisement giving particulars of the trip which stated "Few tickets "left. Apply within". The company had no knowledge and no reasonable means of discovering that any such advertisement had been made. The outing took place and the company, who held no road service licence covering the journey in question, were charged with having used the motor-coach in contravention of s. 72 of the Act of 1930 on the ground that by the condition of s. 25, sub-s. 1 (*b*), of the Act of 1934, such journey "must be made without previous "advertisement to the public of the arrangements therefor".

Held, that, notwithstanding the advertisement, the company were not guilty of the offence charged.

Per Humphreys, J. The rule that where there is an absolute prohibition against the doing of an act absence of scienter affords no defence does not extend to the case of a defendant charged with having done an act lawful in itself but which had become unlawful as the result of some action entirely unknown to him by some other person not his servant or agent.

Per Devlin, J. A man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark. But it is a safe general principle to follow that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence then, in the absence of clear and express words, such punishment is not intended.

CASE STATED by Stone (Staffordshire) justices.

An information was preferred against the defendant company alleging that they unlawfully used a motor-omnibus as an express carriage otherwise than under a road service licence, in contravention of s. 72 of the Road Traffic Act, 1930 (1).

The following facts were proved before the justices:—In 1950 an outing to Skegness was organized for the Stone Women's Guild. It was arranged that the defendant company should take a party to Skegness on June 14 at 14*s*. 6*d*. a passenger, with a minimum of twenty-eight passengers. Membership of the guild depended on membership of the Stafford and Stone Co-operative Society, which membership in turn depended on the holding of a 1*l*. share in the society. Members of the guild paid varying amounts each week towards the cost of the outing.

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(1) Road Traffic Act, 1930, s. 61, sub-s. 1 (*b*), defines "express carriages" as "motor vehicles carrying "passengers for hire or reward at "separate fares . . .". Sub-s. 2: ". . . where persons are carried in a "motor vehicle for any journey in "consideration of separate payments "made by them, whether to the "owner of the vehicle or to any other "person, the vehicle in which they "are carried shall be deemed to be a "vehicle carrying passengers for hire "or reward at separate fares, "whether the payments are solely in "respect of the journey or not: Provided that a vehicle used on a "special occasion for the conveyance "of a private party shall not be "deemed to be a vehicle carrying "passengers for hire or reward at "separate fares by reason only that "the members of the party have "made separate payments which "cover their conveyance by that "vehicle on that occasion".

Section 72, sub-s. 1: ". . . a "vehicle shall not be used as . . . "an express carriage except under" a road service licence. Sub-s. 10: "If any person uses a vehicle or "causes or permits it to be used in "contravention of this section . . . "he shall be guilty of an offence".

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At the end of May, 1950, six seats in the coach remained vacant, and the committee of the guild decided to place a notice of the trip in the window of the society's branch shop in Stone. The advertisement gave particulars of the trip, stating: "Few "tickets left. Apply within". The advertisement was drawn up by the manager of the branch and placed in the window in full view of the public. The outing would have had to be cancelled if all the seats had not been booked. Eventually they were all taken, and the trip was made on June 14, 1950.

The company never told the organizer of the trip that it must not be advertised. The company did not know directly or indirectly that the notice had been placed in the window. Had they known, they would have cancelled the engagement. The company carried on the business of operating motor-coaches, and had their head office at Woodseaves. The company had no road service licence covering the journey.

It was contended for the company that the notice did not constitute a previous advertisement of the trip to the public within the meaning of s. 25, sub-s. 1 (*b*), of the Road Traffic Act, 1934 (2); that guilty knowledge was an essential ingredient of the alleged offence; and that as the company were not responsible for the advertisement, had no knowledge of it, and had no means of discovering its existence, the conditions prescribed in s. 25, sub-s. 1, of the Act of 1934, were fulfilled so far as the company were concerned, and there was no contravention of s. 72 of the Act of 1930.

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(2) Road Traffic Act, 1934, s. 25, sub-s. 1: "For the purposes of the "proviso to sub-s. 2 of s. 61 of the "[Act of 1930], a vehicle shall be "deemed to be used on a special "occasion for the conveyance of a "private party where it is used on a "journey in relation to which the "following conditions are satisfied, "and not otherwise (that is to say): "(*a*) arrangements for the bringing "together of all the passengers . . . "must have been made by some person, not being the holder of the "public service licence in respect of the "vehicle" or his agent "or a person "who receives any remuneration in "respect of those arrangements; (*b*) "the journey must be made without "previous advertisement to the public "of the arrangements therefor; (*c*) "all the passengers must, in the case "of a journey to a particular destination, be carried to, or to the "vicinity of, that destination, or, in "the case of a tour, be carried for the "greater part of the journey; (*d*) no "differentiation of fares for the journey on the basis of distance or of "time must be made; (*e*) in the case "of a journey to a particular destination the passengers must not "include any person who frequently, "or as a matter of routine, travels, "at or about the time of day at "which the journey is made, to that "destination from a place from or "through which the journey is made; "(*f*) the holder of the public service "vehicle licence in respect of the "vehicle" must make or cause to be made a specified record relating to the journey; and "(*g*) the driver of the "vehicle must carry a work ticket "containing" certain particulars to enable that record to be traced and identified.

The justices held that the notice did constitute a "previous "advertisement" within the meaning of s. 25, sub-s. 1 (*b*), of the Act of 1934, but they were of opinion that it was exhibited without the company's knowledge or connivance, and that, as their place of business was ten miles away from Stone, they had no reasonable means of knowing of the advertisement. They were therefore of opinion that the information should have been preferred against the organizer of the outing, and they dismissed the information against the company.

The prosecutor appealed.

J. P. Ashworth for the prosecutor. The Road Traffic Act, 1930, s. 72, sub-s. 1, expressly prohibits the use of an express carriage except under a road service licence. That is in terms an absolute prohibition against that use; mens rea is not a necessary ingredient of the offence of so using it. The motor-coach now in question was in fact an express carriage, and the company should therefore have been convicted under s. 72, sub-s. 1, of using it otherwise than under a road service licence. That the company did not know that the coach was an express carriage can afford them no defence: see *Carter* v. *Mace* (3). "Express carriages" are defined by s. 61, sub-s. 1 (*b*), of the Act of 1930, as "motor vehicles carrying passengers for hire or "reward at separate fares", but the effect of the proviso to sub-s. 2 of that section read with the Road Traffic Act, 1934, s. 25, sub-s. 1, is that such a vehicle is not to be deemed to be an "express carriage" if certain conditions set out in the latter sub-section have been complied with. In a case such as the present a defendant, to excuse himself, must show that all those conditions have been complied with. That, in the present case, the company cannot do, because s. 25, sub-s. 1 (*b*), has not been complied with. No question of mens rea enters into the case in respect of those conditions. The company knew that they had no road service licence covering the journey in question.

[LORD GODDARD, C.J. Is it not going far to make it a criminal offence for something to be done which the defendant can do nothing to prevent? I know that the rule is that where there is an absolute prohibition against the doing of an act it is unnecessary to prove mens rea; the doing of the prohibited act itself supplies the mens rea. But that rule applies only where a man does the prohibited act himself or by his servants.]

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(3) (1949) 113 J. P. 527.

Here the prohibited act was using the coach without an appropriate licence, not the act of advertising the arrangements for the journey. The defendant company themselves did that act.

[Devlin, J. Is it true to say that they " used " the vehicle?]

Yes; they supplied the driver.

[Lord Goddard, C.J. What about the passengers; could they be convicted of the offence?]

They could be convicted of aiding and abetting it.

[Humphreys, J. But were the passengers not themselves " using " the vehicle?]

No. There was use of it only by the defendant company.

[Lord Goddard, C.J. But, surely, everyone who gets into an omnibus uses it? For an offence to have been committed by a person charged with using such vehicle on the ground of such advertisement must he not have done the advertising?]

[Humphreys, J. Is the driver liable to be convicted of the offence charged?]

Yes.

[Devlin, J. The Road and Rail Traffic Act, 1933, s. 1, sub-s. 3, limits the meaning of " use " of a goods vehicle on a road for the carriage of goods, for the purposes of that Act. That provision would exclude use by a passenger.]

That applies generally.

[Humphreys, J. I have grave doubts whether passengers in an omnibus " use " it for the purposes of the Road Traffic Act, 1930, s. 72, or whether they are under any duty to make any inquiry at all in a case such as the present one whether the conditions of s. 25, sub-s. 1, of the Act of 1934, have been complied with.]

Harding v. *Price* (4) is distinguishable from the present case. Here the company ought to have told the organizer of the trip that it should not be advertised; if she had been told no advertisement would presumably have been made.

[Lord Goddard, C.J. On the contrary a women's club would probably consider such a regulation to be ridiculous.]

In Evans v. *Hassan* (5), Goddard, J., said during the course of the argument of s. 72 of the Act of 1930: " The fact that it " is an absolute prohibition is not enough in itself to do away " with mens rea ".

(4) [1948] 1 K. B. 695.

(5) [1936] 2 All E. R. 107, 108.

[LORD GODDARD, C.J. I am not satisfied that that remark is correctly reported. In my judgment there I reserved my opinion on the question whether mens rea was or was not a necessary ingredient of this offence, and expressed no opinion on the point.]

That case was in fact unarguable.

[LORD GODDARD, C.J. I have always thought (rightly or wrongly) that where an act is absolutely prohibited the doing of it supplies the mens rea, and that it is not then open to the defendant to say that he did not know that he was doing wrong.]

Evans v. *Dell* (6) is distinguishable from the present case; there the charge was permitting a vehicle to be used in contravention of s. 72 of the Act of 1930, not using it. There is a distinction between the mens rea that is necessary to constitute "permitting" the use of a vehicle and that (if any) necessary to constitute "using" it in contravention of s. 72.

[LORD GODDARD, C.J. But is it true to say that a limited company can "use" a vehicle, as opposed to causing or permitting it to be used?]

Yes. The defendant company themselves "used" the vehicle in the present case within the meaning of s. 72: see *Griffiths* v. *Studebakers Ld.* (7).

David Karmel, K.C., and *J. M. Davies* for the company. As regards the last point, three types of offence are created by s. 72, sub-s. 10: using the vehicle and causing and permitting it to be used in contravention of sub-s. 1. Only the owner of the vehicle (in the present case the company) could be charged with "permitting" it to be so used. In the present case the organizer of the trip "caused" the vehicle to be used; she also "used" it. The driver, too, "used" it. According to the argument on behalf of the prosecutor the driver could have been charged and convicted of the offence charged though he was in complete ignorance that the advertisement had been made and could not possibly have avoided the commission of the offence. In the usual course the company would have been charged with causing the vehicle to be used, not using it, in contravention of s. 72. There ought to be the same standard regarding the necessity for mens rea whether the defendant is charged with using or causing or permitting a vehicle to be used in contravention of that section.

[LORD GODDARD, C.J. If a man's own servant is driving a vehicle, is not the employer "using" it?]

(6) (1937) 53 T. L. R. 310.

(7) [1924] 1 K. B. 102.

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In *Gifford* v. *Whittaker* (8) that point was left open; there is no authority either way. But the point was not taken below in the present case that the defendant company were not using the vehicle in question.

[DEVLIN, J. But, as a matter of general law, do you say that the employer is using it or not?]

An employer is not using a vehicle driven by his servant.

[LORD GODDARD, C.J. The employer would be using it if it were used on his business.]

Prima facie mens rea is an essential ingredient of an offence. The only exceptions are in cases where the safety of the public is involved, e.g., in the case of certain offences under the Food and Drugs Acts. There is no question in the present case of any danger to the safety of the public. In *Evans* v. *Dell* (9) Goddard, J., was of opinion that mens rea was an essential ingredient in offences under the Road Traffic Acts; his judgment was not limited in this respect to the offence of "permitting" a vehicle to be used in contravention of s. 72 of the Act of 1930.

In *Sherras* v. *De Rutzen* (10) Wright, J., said: "There must "in general be guilty knowledge on the part of the defendant, or "of someone whom he has put in his place to act for him". In the present case there is no question of guilty knowledge on the part either of the company or the driver of the vehicle.

[LORD GODDARD, C.J. Here, as in that case, if guilty knowledge is not necessary, no care on the part of the defendants can save them from conviction: see per Wright, J., in *Sherras* v. *De Rutzen* (11).]

[DEVLIN, J. If no care on the part of an employer or his servants can prevent the commission of an offence, and he is punished for it, he is punished simply for being unlucky; he is treated as an insurer.]

In the present case it is alleged that an offence was committed on account of an act of a person over whom the company had no control whatever.

[LORD GODDARD, C.J. But here the prohibited act is said not to be the advertising of the trip but the user of the vehicle without an appropriate licence. Is it not arguable that the principle of *Cundy* v. *Le Cocq* (12) applies?]

Sherras v. *De Rutzen* (13) is relied on. The present case is a stronger one than that. There the erring constable was present

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(8) [1942] 1 K. B. 501.
(9) 53 T. L. R. 310, 313.
(10) [1895] 1 Q. B. 918, 922.
(11) Ibid. 923.
(12) (1884) 13 Q. B. D. 207.
(13) [1895] 1 Q. B. 918.

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at the alleged commission of the offence. Here the advertisement complained of was inserted in a shop window ten miles away from the company's place of business. The company gained no advantage from the advertisement; their contract to make the journey was then complete.

Carter v. *Mace* (14) is distinguishable from the present case.

Ashworth in reply. *Carter* v. *Mace* (14) is relied on. The argument that mens rea is a necessary ingredient of a criminal offence unless the safety of the public is involved does not take into account the instance of offences against revenue statutes which do not require mens rea: see *per* Wright, J., in *Sherras* v. *De Rutzen* (15).

Cur. adv. vult.

Feb. 16. LORD GODDARD, C.J. Humphreys, J., will deliver the first judgment.

HUMPHREYS, J. This case raises once more the question, often argued, to what extent, if any, ignorance of the fact or facts constituting an offence avails a person charged with doing an act expressly forbidden by statute, where the doing of the act is proved or admitted.

The defendants, a limited company, were charged with having on June 14, 1950, unlawfully used a vehicle, to wit, an omnibus, as an express carriage otherwise than under and in accordance with the terms of a road service licence, contrary to s. 72 of the Road Traffic Act, 1930.

[His Lordship read the relevant statutory provisions, and continued:] As a result of that somewhat complicated legislation it would seem that a trip otherwise lawful becomes unlawful and renders the user of the vehicle liable to prosecution under s. 72 of the Act of 1930 if any one of the conditions specified in s. 25 of the 1934 Act is not satisfied.

[His Lordship then stated the facts, and continued:] The justices held, and in my opinion rightly, that the notice of the trip in question in the co-operative society's branch shop at Stone constituted a previous advertisement to the public within the meaning of s. 25, sub-s. 1 (*b*), which rendered the use of the vehicle on June 14, 1950, unlawful. There was accordingly, in my opinion, a prima facie case against the defendant company. The justices, however, dismissed the information on grounds which they state as follows: "We were of opinion that the "advertisement was made without the knowledge or connivance "of the respondent in any way and as the respondent's place of "business was ten miles away he had no reasonable means of "knowing that it had been made . . .".

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(14) 113 J. P. 527.

(15) [1895] 1 Q. B. 918, 922.

I agree that it is important that the rule should not be relaxed which declares that when there is an absolute prohibition against the doing of an act scienter forms no part of the offence, and absence of it affords no defence to the accused person, but, in my opinion, that rule does not extend to the case of a defendant charged with having done an act lawful in itself but which had become unlawful as the result of some action entirely unknown to him by some other person not his servant or agent.

I am not entirely satisfied that the offence alleged in this case is one to which the doctrine applies at all, but as the point was not argued before us I prefer not to base my judgment on that ground.

On the question which was argued, whether the company ought to have inquired whether the party had been publicly advertised, it is to be noted that the relevant condition in s. 25, sub-s. 1, comes directly after condition (*a*), which in effect forbids the person providing the vehicle from taking part in making the arrangements for the party.

Nor do I find any indication in the section itself that it should be so strictly construed as is contended for by the prosecutor. If that result is to follow it must be upon clear and unambiguous language. The words in s. 72, sub-s. 10, of the Road Traffic Act, 1930, which creates the offence, "if any person uses a vehicle or "causes or permits it to be used", do not suggest to my mind that the legislature intended that different considerations should apply to those three cases, and it is plain that in the case of permitting at least lack of knowledge may be a complete defence: see *Evans* v. *Dell* (16). The language of the judgment of Goddard, J., in that case seems to me to be entirely appropriate to the present one. He observed (17): "With the complexity "of modern legislation one knows that there are times when the "court is constrained to find that by reason of the clear terms "of an Act of Parliament mens rea, or the absence of mens rea, "becomes immaterial, and that if a certain act is done an offence "is committed whether the person charged knew or did not know

(16) 53 T. L. R. 310.

(17) Ibid. 313.

" of the Act. When one gets complete vindication of the respondent, as in this case, so far as any knowledge of being guilty of " using the coach wrongly, I find nothing in this Act which " constrains me to hold that, knowledge or no knowledge, he is " guilty of the offence ".

I would only add that, whereas in the present case the justices have acquitted the defendant company, the prosecutor who is appealing to this court must satisfy us that their decision was wrong in law—not that they might have convicted, but that they were bound to convict.

In my opinion the appeal should be dismissed.

LORD GODDARD, C.J. The justices having absolved the defendant company from any knowledge that the journey for which they had let the vehicle in question had been advertised—and on the evidence, clearly, they could have come to no other finding—they dismissed the summons. None would, I imagine, deny that in so doing they acted in accordance with what would appear to be elementary principles of justice. But as every lawyer knows, when one has to deal with positive law surprising results may follow and a statute may perhaps unintentionally oblige a court to hold that which in ordinary circumstances would be contrary to every idea of justice or even common fairness.

The argument of the prosecutor on behalf of the Ministry of Transport may thus be stated:—if this class of vehicle is used without the special class of road licence the user, in this case the owner, must show that it was being used on a " special occasion ", and if he cannot show compliance with all the conditions which must exist to create a special occasion under s. 25, sub-s. 1, of the Act of 1934 he commits an offence, although the material condition was broken not by him but by some other person, and that without his knowledge or connivance. This is an intelligible proposition, however unjust the result might be, and must be faced, but observe how far it would go: were a coach proprietor to require his customer to make a statutory declaration that the trip had not been advertised, the owner would still be guilty if the declaration proved to be false, and that even if the declarant did not know of the falsity, as might be the case if one of the party, unknown to the promoter of the trip, had advertised it somewhere. Unless compelled by the words of the statute so to hold, no court should give effect to a proposition which is so repugnant to all the principles of criminal law in this kingdom. This is not to throw any doubt on the well-established principle that if there is an absolute prohibition and the prohibited act is done a penalty is incurred, but hitherto that doctrine has never been applied, as far as I know, to a case where the prohibited act was not that of the defendant, but of some person over whom he had no control and for whom he had no responsibility. I am not now considering the cases of delegated management or of a shopkeeper's liability under such Acts as the Food and Drugs Acts for sales by his servants. The impossibility of any defence if such a construction were given is what underlies, in my opinion, the decision in the well-known case of *Sherras* v. *De Rutzen* (18). The charge there was serving a police constable on duty with intoxicating liquor, an act against which there was what appeared to be an absolute prohibition. The licensee had been deceived into believing that the constable was off duty. In holding that that was a defence, Day, J., based his judgment (19) on the ground that the absence of the word " knowingly " in the statute only shifted the onus of proof so that it was for the defence to prove lack of knowledge and not for the prosecution to prove that there was knowledge. This affirms the principle that except in cases where the statute creates an offence of knowingly doing an act the prosecution can establish a prima facie case merely by proving the act was done. Lack of knowledge must be proved by the defendant as the burden of proving knowledge or the lack of it with respect to the act to be proved depends upon the opportunities of knowledge which may be possessed by the respective parties: see Stephen's Digest of the Law of Evidence (12th ed.), art. 104. R. S. Wright, J., after an illuminating analysis of the circumstances as to which knowledge or no knowledge was material in considering whether the provisions of a statute had been broken, said in that case (20): " If guilty knowledge is not " necessary, no care on the part of the publican could save him " from a conviction ". I need not emphasize the weight that attaches to any pronouncement of that judge, more especially on matters concerned with the construction of statutes. That case is sometimes thought to be in conflict with other decisions where the prohibition appears to be absolute, but in my opinion, when properly understood, it is not. The fact is that the court refused to regard the prohibition as absolute and held that lack of knowledge was a defence as otherwise a man could never defend himself. This does not mean that a defendant can set up ignorance of the law, but that he may plead ignorance of some fact which is necessary to constitute the offence. The licensee was not saying that he did not know that the law forbade him to serve a constable on duty; what he did say was that he did not know that the constable was on duty and in fact believed that he was not. The court evidently accepted the submission on behalf of the publican that an honest and reasonable belief in the existence of circumstances which, if true, would make the act an innocent act was a good defence.

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(18) [1895] 1 Q. B. 918.

(19) Ibid. 921.

(20) Ibid. 923.

To come to the present case, what is said is that there is an absolute prohibition against this class of vehicle being used without the appropriate licence and, moreover, that the defendant knew, as, of course, he did, that it had none. But is that to be regarded as a prohibition that is absolute? The vehicle can be used without a licence on a "special occasion", and so far as the defendant knew or intended the occasion in question was special. Whatever the form of the summons no one pretended that the vehicle was being used as an ordinary express carriage as defined in s. 61, sub-s. 1 (*b*), of the Act of 1930; what was suggested and proved was that one of the conditions which would have entitled the journey to be regarded as a special occasion had been broken not by the defendant company but by someone for whom they had no responsibility. To make them guilty of an offence the breach must, in my opinion, have been committed by them or to their knowledge. I need not consider whether they might be made civilly liable for any sum of money which may have to be paid for a road service licence, but in my opinion, on the principle of *Sherras* v. *De Rutzen* (21), they are not guilty of the criminal offence.

A consideration of the conditions of s. 25, sub-s. 1, of the Act of 1934, which have to be satisfied to make the journey a special occasion, show that some impose a prohibition or some duty on the user, who for this purpose is equivalent to the owner: such are those in paras. (*a*), (*d*), (*f*) and (*g*). Clearly no question of knowledge arises in regard to them. It seems to me that quite different considerations apply to conditions (*b*), (*c*) and (*e*). The owner must, of course, be no party to a breach of them, but they appear to me to apply not only to acts of the owner but to those of others whom he could not control. Take, for instance, condition (*c*): no doubt the owner must not agree to carry some of the passengers only for part of the journey; but if one of them

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(21) [1895] 1 Q. B. 918.

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felt ill or for any reason insisted on getting out after a short distance, could it possibly be said the owner committed an offence? And how is a coach owner who contracts to carry a party from a town some miles from his garage to a destination perhaps in the opposite direction to be certain that one member of the party of whom he has never heard is not a person who frequently or as a matter of routine travels at or about the time of day at which the journey is made to that destination from a place from or through which the journey is made? Such considerations reinforce the opinion which I have formed that knowledge is a material ingredient.

Then it will be observed that s. 72, sub-s. 10, of the Act of 1930, imposes a penalty on a person who uses or causes or permits a vehicle to be used in contravention of the section. I adhere to what I said in *Evans* v. *Dell* (22), where the charge was preferred against the owner in circumstances very similar to the present of permitting the use of a vehicle in contravention of that provision, and it is said that that distinguishes it from this case because here the charge is using. There is ample authority that a man cannot be guilty of permitting that of which he does not know, e.g., *Somerset* v. *Hart* (23). I will certainly be no party to holding a man guilty or not guilty of this offence according to whether the informant charges him with using or with permitting the use. This would be reducing the law to an absurdity.

I agree that the appeal should be dismissed, and I should like to express my appreciation of the way in which the justices dealt with this matter and the clarity with which they have stated the case.

DEVLIN, J. It has always been a principle of the common law that mens rea is an essential element in the commission of any criminal offence against the common law. In the case of statutory offences it depends on the effect of the statute. In *Sherras* v. *De Rutzen* (24) Wright, J., in his well-known judgment, laid it down that there was a presumption that mens rea was an essential ingredient in a statutory offence, but that that presumption was liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it dealt. It is worth noting that at the bar Mr. R. S. Wright had conceded the existence of the principle in his successful argument in *Cundy*

(22) 53 T. L. R. 310, 313.
(23) (1884) 12 Q. B. D. 360.
(24) [1895] 1 Q. B. 918, 921.

v. *Le Cocq* (25). Kennedy, L.J., in *Hobbs* v. *Winchester Corporation* (26) thought that in construing a modern statute this presumption as to mens rea did not exist. In this respect, as he said, he differed from Channell, J., in the court below. But the view of Wright, J., in *Sherras* v. *De Rutzen* (24) has consistently been followed. I need refer only to the dictum of Lord Goddard, C.J., in *Harding* v. *Price* (27): " The general rule applicable to " criminal cases is actus non facit reum nisi mens sit rea, and I " venture to repeat what I said in *Brend* v. *Wood* (28): ' It is " ' of the utmost importance for the protection of the liberty of " ' the subject that a court should always bear in mind that, " ' unless a statute either clearly or by necessary implication " ' rules out mens rea as a constituent part of a crime, the court " ' should not find a man guilty of an offence against the criminal " ' law unless he has a guilty mind '. In these days when " offences are multiplied by various regulations and orders to an " extent which makes it difficult for the most law-abiding subjects " in some way or at some time to avoid offending against the law, " it is more important than ever to adhere to this principle ".

The statutory provision which we have to consider, the Road Traffic Act, 1930, s. 72, makes it an offence to use a vehicle or to cause or permit it to be used as an express carriage except under a road service licence. The defendant company are charged with using the vehicle, and the vehicle was actually being used on their business by one of their servants. Counsel on their behalf has argued that " use ", when contrasted with causing or permitting the use, should be given a narrow meaning and that the respondents should be said to have caused or permitted the use rather than to have used it themselves. Mens rea is admittedly necessary for the offence of permitting the use: *Evans* v. *Dell* (29). I think that it would also be necessary for the offence of causing the use. The point, which does not appear to have been taken before the justices, is of importance only if mens rea is not essential to the offence of using. As in my view it is, I do not express any opinion on the narrower point of construction.

Applying the principle I have stated, prima facie the defendant company committed no offence unless mens rea or guilty knowledge was present. The first question, therefore, is whether on the true construction of this statute the presumption can be rebutted. There are certainly no express words to rebut the presumption. In considering whether there is an implication of rebuttal it is necessary to have regard to the language of the statute as a whole and to the subject-matter with which it deals. There is, in my view, nothing in the language of this statute to rebut the presumption; and something, which I shall consider later, to suggest the contrary. But the main weight of the case for the prosecutor rests on the contention that this statute belongs to a class in which mens rea should be dispensed with. There is no doubt that some of the provisions of the Road Traffic Acts do fall within that class: see, for example, *Griffiths* v. *Studebakers Ld.* (30). It may seem, on the face of it, hard that a man should be fined, and, indeed, made subject to imprisonment, for an offence which he did not know that he was committing. But there is no doubt that the legislature has for certain purposes found that hard measure to be necessary in the public interest. The moral justification behind such laws is admirably expressed in a sentence by Dean Roscoe Pound in his book "The Spirit of "the Common Law", at p. 52: see The Law Quarterly Review, vol. 64, p. 176. "Such statutes", he says, "are not meant to "punish the vicious will but to put pressure upon the thoughtless "and inefficient to do their whole duty in the interest of public "health or safety or morals." Thus a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark. Although, in one sense, the citizen is being punished for the sins of others, it can be said that, if he had been more alert to see that the law was observed, the sin might not have been committed. But if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim. Without the authority of express words, I am not willing to conclude that Parliament can intend what would seem to the ordinary man (as plainly it seemed to the justices in this case) to be the useless and unjust infliction of a penalty.

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(24) [1895] 1 Q. B. 918, 921.
(25) 13 Q. B. D. 207, 208, 209.
(26) [1910] 2 K. B. 471, 483.
(27) [1948] 1 K. B. 695, 700.
(28) (1946) 62 T. L. R. 462, 463.
(29) 53 T. L. R. 310.

That these considerations are of capital importance is shown in the judgment of Wright, J., in *Sherras* v. *De Rutzen* (31), where he says: "It is plain that if guilty knowledge is not "necessary, no care on the part of the publican could save him

(30) [1924] 1 K. B. 102.

(31) [1895] 1 Q. B. 918, 923.

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"from a conviction . . .". In the present case there is nothing which the owner of the vehicle could be reasonably expected to have done to see that the offence was not committed. It is said that he could have recited to the organizer of the trip the conditions laid down in the Road Traffic Act, 1934, s. 25, sub-s. 1, and, indeed, even have obtained from her an undertaking that they would be complied with. But suppose that he did. If she broke the undertaking, he would still, upon the construction of the section which has been urged upon us, be liable. It is permissible also to examine the other conditions; for we have to construe this section in its application generally and not merely as restricted to the facts of this particular case. If the owner of the vehicle had taken every conceivable precaution to ensure that the conditions were observed, but after the journey began a passenger refused to complete it, the condition (*c*) would be broken. Is the owner to be punished for that? Is he to be punished if, in breach of condition (*a*) the organizer of the party surreptitiously takes a little remuneration? He must not, at the risk of committing a breach of condition (*a*), take any part in the arrangements for bringing the passengers together for the journey; but if those passengers include one who is travelling at his normal time on his normal route, condition (*e*) is broken. No amount of forethought and no degree of efficiency can protect the accused. The people whose acts may create the criminal offence are not merely people outside his sphere of influence, but are people whom the Act insists should be kept outside it. To punish the owner of the vehicle in such circumstances achieves no object except to make him an underwriter of the good behaviour of the community at large. I think it a safe general principle to follow (I state it negatively, since that is sufficient for the purposes of this case), that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence then, in the absence of clear and express words, such punishment is not intended.

There is another way in which the matter may be tested. In the case of statutes which apparently dispense with mens rea, it is sometimes said that it is the doing of an act which is absolutely prohibited that itself supplies the mens rea. In many such cases it is impossible to do the prohibited act without being conscious of it; and though in such cases there may be no moral guilt if the accused does not know that he was doing wrong, this is an excuse which the law cannot permit. In other cases it is possible, by taking heed, to avoid the doing of the prohibited act. In *Cundy* v. *Le Cocq* (32), in which the decision turned partly on the wording of the Act, it was also said that the object of the Act was to put upon the publican the responsibility of determining for himself whether a person supplied with drink was sober or not, and so conceivably to punish him for an error of judgment. But in the present case, as I have pointed out, not only are there no means of knowledge open to the accused but there are no data available to him on which he could arrive at any determination whether the law was likely to be broken or not. Even after the event it would need a judicial inquiry, covering the past activities of the organizer and each of the passengers, before it could be determined whether it had been broken. An express carriage is not a type of vehicle which can be identified by observation. No driver on one of these expeditions could answer the question whether or not he was driving an express carriage. In truth, an express carriage is an abstract conception. A vehicle may begin as an ordinary vehicle and become an express carriage in the course of its journey if a passenger insists on dismounting. It is a creature of statute; and a creature which, in its habits of appearing and disappearing (and, I suspect, of leaving a grin behind it at the legal complications which its behaviour may cause), has many of the attributes of the Cheshire cat. In these circumstances, it would be going further than any decided case has yet gone, and further than I am willing to go without the clearest authority, to construe the statute as imposing an absolute prohibition.

The words of s. 72 of the Act of 1930, so far as they help, suggest the contrary. In sub-s.10 of s. 72, the legislature deals, as it were, in the same breath, with using the vehicle and causing or permitting it to be used, and treats all as being subject to the same penalty. Inasmuch as there must be guilty knowledge in the last two cases, the lack of differentiation suggests that there must be guilty knowledge in all three, and that it is assumed that the user will know of the facts which constitute the offence. The same sub-section makes it an offence if the holder of a road service licence wilfully or negligently fails to comply with any of its conditions. The object of the section is that a vehicle shall not be used for purposes for which it is not licensed. It is just as much so used if it is used in breach of a condition as if it is used without any licence at all. I see no reason for requiring proof of a wilful or negligent act before a man can be convicted in the former case, and not requiring it in the latter. It would be strange if Parliament required proof of wilfulness or negligence in relation to the breach of a condition in the licence, which would ordinarily cover matters within the owner's control, and did not require it in the case of such conditions as those set out in s. 25 of the Act of 1934.

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(32) 13 Q. B. D. 207.

Counsel for the prosecutor presented an attractive argument which, I think, can be expressed as follows: the section prohibits the use of the vehicle as an express carriage. Prima facie this vehicle was going to be used as an express carriage and the company knew it; for they knew that it was going to be used for the carriage of persons who were making separate payments. Prima facie, therefore, there is a prohibited use, but the Act relieves the user if there is a special occasion. If he wants to take advantage of that relief, he must prove that there was a special occasion; and if by reason of some accident, albeit one for which he is not responsible, he cannot give that proof, it is his misfortune.

It is no doubt true as a general proposition that, if a statute creates an offence subject to an exception, it is for the accused to bring himself within that exception if he wishes to take advantage of it. Thus, in *Brooks* v. *Mason* (33), the Act provided that every holder of a licence who knowingly sold or delivered any intoxicating liquor to a child, "excepting such intoxicating "liquors as are sold or delivered in corked and sealed vessels", committed an offence. It was held that, once it had been proved that the defendant knowingly delivered intoxicating liquor to a child, he was guilty of an offence although he honestly believed (contrary to the fact) that the liquor was in a corked and sealed vessel. But I cannot find any warrant either in the language of these sections, nor in their scope as a whole, for construing the proviso relating to the special occasion as if it were an exception to a prima facie liability. The relevant provisions are not too easy to follow but, I think, may be summarized in four propositions.

First, an express carriage is a vehicle which carries passengers for hire or reward at separate fares: Act of 1930, s. 61, sub-s. 1 (*b*). Secondly, a vehicle which carries passengers in consideration of separate payments made by them to any person, whether the owner of the vehicle or not, is *deemed* to be carrying passengers for hire or reward at separate fares, i.e., an express carriage: Act of 1930, s. 61, sub-s. 2. Thirdly, a vehicle used on a special

(33) [1902] 2 K. B. 743.

occasion for the conveyance of a private party shall not be *deemed* to be an express carriage merely because the members of the party have made separate payments: proviso to s. 61, sub-s. 2. Fourthly, a vehicle shall be *deemed* to be used on a special occasion only when certain conditions are satisfied: Act of 1934, s. 25, sub-s. 1.

I have stressed the word "deemed" because I think that it shows that everything that is said is part of the definition. This chain of provisions seems to me to be designed to be read as a whole so that the reader may eventually arrive at an understanding of the concept of an express carriage. I do not think that there is any point in the process at which it can be said, as it were, that the definition has stopped growing, and that what follows is an exception grafted upon it. It certainly cannot be said that the language clearly and unambiguously creates an exception; and if there be any ambiguity, I should lean strongly against a construction which convicts the defendant company in circumstances such as these. Moreover, if there were an exception, it would naturally follow that the burden of proof would be upon the accused to bring himself within it; and the task of showing affirmatively that all the conditions had been complied with would be monumental.

I think that the proper question of fact in this case is: Did the company know that the vehicle was being used, and used as an express carriage? As was said in the advice of the Privy Council in *Bank of New South Wales* v. *Piper* (34): "The "absence of mens rea really consists in an honest and reasonable "belief entertained by the accused of the existence of facts which, "if true, would make the act charged against him innocent". That is what in effect the justices have found in this case; and so I think that they were right in law in refusing to convict.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Beale & Co., London and Birmingham.*

R. P. C.

(34) [1897] A. C. 383, 389, 390.

C. A.

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Feb. 2, 6,
7, 21.

Cohen,
Asquith and
Birkett, L.JJ.

WOOLFE *v.* WEXLER.

[1949 W. 2854.]

Emergency legislation—Building licence—Claim for work done—Work ordered by person not being person to whom licence granted—Defence (General) Regulations, 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 56A (*as amended*), *paras.* 1, 2, 6 *to* 8.

During negotiations for the purchase of the freehold of a building, the prospective owner began discussions with a view to letting part of the premises to a third party who insisted that certain work should be executed before he took a lease of the premises. The owner entered into a contract with a builder to carry out the work telling him that the cost of the work would be shared between the incoming tenant and himself—a provision to that effect being embodied in the tenancy agreement made subsequently.

The owner instructed his architect to apply for a licence covering the proposed work and to insert the tenant's name on the prescribed form of application as being "the applicant, that is, the person "paying the cost of the proposed work"—although, in fact, the tenant never came into contractual relationship with the builder and was not directly liable to him for the cost of the work or any part of it. The licence having been granted in the name of the tenant, the work was carried out, the builder taking all instructions from the owner, though the builder also discussed the work with the tenant and received payments on account from him. The owner refused to pay the balance of the cost of the work, and the builder issued a writ against him. At the hearing before the official referee, the owner contended that, as the licence had been granted to the tenant and not to him, and as he was the person liable to pay the builder, the work was not authorized by a licence and, by virtue of regulation 56A (2.) of the Defence (General) Regulations, 1939, was unlawful, attracting a penalty under para. 6; and, consequently, that the builder could not claim payment for it. Alternatively, he contended that the licence had been transferred to him in breach of a condition subject to which it had been issued, which attracted a penalty under para. 8 of the regulation and that that rendered the work illegal:—

Held, that, as there was no express requirement in para. 2 of the regulation that the licence to work must be in the name or names of the person or persons at whose expense it was carried out, the licence was not invalidated and the work was not rendered illegal by the fact that the defendant's name did not appear in it, for the court would, in construing a penal provision, not imply such a requirement, and would not hold that an offence had been committed unless the case was clearly and certainly within the language of the provision, which this case was not. The policy of the

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

regulation was to prevent the doing of work of a kind or at a cost not covered by a licence or for a purpose not covered by a licence, and what had been done was not contrary to that policy.

Semble, assuming that the licence had been transferred from the tenant to the owner (which the evidence did not establish), that breach of a condition of the licence only attracted a penalty under para. 8 and did not invalidate the licence, for it did not involve a breach of the prohibition against doing work without a licence.

Bostel Bros. Ld. v. *Hurlock* [1949] 1 K. B. 74 considered.

APPEAL from Judge Earengey, K.C., sitting as a deputy official referee.

In May, 1946, the defendant, Wexler, was a tenant of Cleveland House, Richmond Road, E.18. His tenancy having only a short time to run, he approached the freeholders to purchase the freehold, but, before negotiations were completed, he began discussions with a view to letting part of the premises. The prospective tenant insisted that certain alterations would have to be made to the premises if he was to take a lease, and the defendant asked the plaintiff Woolfe, a builder, to estimate the cost of those works, explaining that part of the cost would be paid by the prospective tenant; but the builder said that, as he knew the defendant, he preferred to deal only with him. The builder estimated that the works would cost 800*l*. At that stage there was no binding contract between the builder and the defendant. Meanwhile, the defendant and his tenant had agreed that the cost of the works should be shared equally between them—a written agreement to that effect being signed on August 6.

As the plaintiff was illiterate, all the typing and preparing of accounts and estimates in connexion with work done by him for the defendant was done in the defendant's office by the defendant's staff, the defendant's manager playing a prominent part. The defendant introduced the tenant to his (the defendant's) architect, who had been consulted on the alterations of Cleveland House in February, 1946. On June 3, 1946, on the defendant's instructions, the architect made an application for a licence, inserting the name of the tenant as applicant on the express instructions of the defendant. In answer to the question on the application form, "Full name and address of applicant, i.e., "person paying the cost of the proposed work" was written "J. Lament [the tenant], c/o Durnford & Moore". The address at which the work was to be carried out was stated as "Building, Railway Bridge, Richmond Road, Hackney". That was Cleveland House. The premises were described as a factory and work rooms. The business was described as "dress manufacturing", the tenant being in fact a dress manufacturer. A specification was attached as showing the nature of the work. In answer to the question "Reasons why the work is regarded as "necessary at the present time", it was stated: "To replace "premises now required to be surrendered", meaning surrendered by the tenant. The name and address of the builder was given as "J. Woolfe", the plaintiff. The "estimated cost of "proposed work" was given as 1,675*l.*, and the form was signed by the architect's firm, purportedly on behalf of the prospective tenant. The only respect in which it was suggested that the statements in that application form were inaccurate was that it implied that the tenant came into direct contractual relationship with the plaintiff builder whereas in fact he did not; and in any event, under the terms of the tenancy agreement with the defendant, the tenant was to pay only part of the cost of the work.

On June 27, 1946, the Minister of Works granted the licence to carry out the desired work at a cost of 1,675*l.* The licence was addressed to J. Lament, care of the architect's firm. Certain conditions were imposed, including one that the licence was not transferable. The licence contained also the following condition: "8. Immediately the work has been completed, the licensee must "inform the licensing officer and state the cost of the work which "has been carried out". Note B read: "This licence does not "remove any obligations to comply with the provisions in force "under Public General and Local Acts and by-laws, or the "Restriction of Development Act, 1935, or Town and Country "Planning Acts or Orders. It is desirable that the holder of this "licence should consult the local authority on these matters".

The licence having been obtained, on July 6, 1946, the plaintiff (or someone on his behalf, for it was signed "per pro") addressed a letter to the defendant and the tenant containing an estimate for the work specified in the schedule attached to the application form. That work included the work, half of the cost of which the tenant was to bear under his arrangements with the defendant. The letter concluded with the words: "Upon your "confirmation and the necessary licence this work will be put in "hand". The defendant's technical manager testified that he prepared that letter for typing. On receiving an assurance from the defendant, or from the manager in the defendant's presence, that the defendant had a licence which was in a drawer in the defendant's office, the plaintiff builder carried out work in respect of which the licence was granted. During the course of the work the builder took all his instructions from the defendant, refusing to take them from anyone else, though he also discussed the work with the tenant and received three payments on account from him.

The defendant having refused to pay the balance of the cost of the work, the builder issued a writ against him on September 19, 1949.

Judge Earengey, sitting as deputy official referee, gave judgment for the plaintiff builder, and the defendant appealed.

H. Lester for the defendant. The work done by the builder was not covered by a licence. Consequently there has been a breach of para. 2 of the regulation (1), the work was unlawful, and he cannot claim payment in respect of it.

Paragraph 2 of the regulation contemplates that the person carrying out the work does so under a particular licence and that he is in contractual relationship with the licensee. It is clear from the application form that the person who is liable to pay the builder should be the licensee.

If there has been a breach of para. 2, the builder cannot recover even though the breach was unintentional or induced by a misrepresentation. The onus is on him to satisfy himself that the licence is in order. [Counsel referred to *Dennis (J.) & Co. Ld.* v. *Munn* (2); *Taylor* v. *Chester* (3); *Nash* v. *Stevenson Transport Ld.* (4); and *Mahmoud* v. *Ispahani* (5).]

Alternatively, if the defendant had a licence covering the work which he ordered, then that licence must have been transferred to him by the tenant in breach of the condition to which it was made subject, for the licence was issued to the tenant personally and not as being the agent of the defendant. An agent cannot apply for a licence in his own name to be used by an unnamed principal, for that would be opening the door to the buying and selling of licences—which the Ministry are anxious to prevent. The person applying for a licence must give reasons why the licence should be granted to him, and those reasons might not be applicable to another person. The builder cannot rely on the licence granted to the tenant because the tenant was not a party to the contract between the builder and the defendant.

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(1) By Defence (General) Regulations, reg. 56A (2.): " . . . the carrying out . . . of any work . . . on "a building . . . shall be unlawful "except in so far as there is in respect thereof a licence granted by the "Minister . . .".

By para. (6.): "If any . . . work is "carried out in contravention of any "of the first three paragraphs of this "regulation the person at whose "expense . . . the work is carried "out . . . shall . . . be guilty of an "offence against this regulation . . .".

By para. (8.): "If any condition "attached [under para. 7] to a . . . "licence granted for the purposes of "this regulation is contravened or not "complied with . . . the person at "whose expense . . . the work is "carried out . . . and . . . the person ". . . carrying out the work . . . "shall each be guilty of an "offence . . .".

(2) 48 L. G. R. 656.

(3) (1869) L. R. 4 Q. B. 309.

(4) [1936] 2 K. B. 128.

(5) [1921] 2 K. B. 716.

A. Campbell for the plaintiff builder. The performance of the contract made by the plaintiff was not illegal for it was covered by the licence granted to the tenant. No work has been done in excess of that licence. It is true that the licence is not in the name of the person ordering the work, but para. 2 of the regulation does not state that the licensee must be the person who is paying for the work; and, as this regulation is penal, the courts will resolve any ambiguity in it in favour of the subject. The defendant has referred to the application form in support of his contention, but it is submitted that this is inadmissible in construction of the licence. [He referred to *Rex* v. *Barnet etc. Rent Tribunal; Ex parte Reeds Investments Ld.* (6).]

Further, there has not been any breach of the condition attached to the licence that it should not be transferred. It is submitted that in fact it has not been transferred; but, even if it had, a transfer would not invalidate the licence but would merely give rise to a penalty if, as in this case, the breach of the condition did not involve a breach of paras. 1 and 2 of the regulation. [He distinguished *Bostel Bros. Ld.* v. *Hurlock* (7), relying on the argument there of Mr. Beney, K.C.]

Alternatively, if the contract was illegal (and that is denied), the defendant cannot rely on the illegality, for the contract could have been performed either illegally or legally. The defendant could have applied for a licence in his own name and there would then have been no doubt as to the legality of the performance of the contract. If the defendant elected to perform the contract in an illegal manner without the knowledge of the other party, he cannot plead the illegality. [He referred to *Mahmoud* v. *Ispahani* (8); *Waugh* v. *Morris* (9); *Drummond* v. *Deey* (10); *Reynell* v. *Sprye* (11); Chitty on Contracts (20th ed.), p. 471; and Pollock on Contracts (13th ed.), p. 346.] Here something akin to fraud has been practised on the plaintiff, and he can recover under the contract even if (which is denied) there has been a technical breach of the regulation, for the plaintiff is the least guilty party, and the case is clearly outside the mischief of the regulation.

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(6) (1950) 48 L. G. R. 656.
(7) [1949] 1 K. B. 74, 77.
(8) [1921] 2 K. B. 716, 729.
(9) (1873) L. R. 8 Q. B. 202, 208.
(10) (1794) 1 Esp. 152.
(11) (1852) 1 De G. M. & G. 660, 675.

Lester replied.

Cur. adv. vult.

February 21. COHEN, L.J., reading the judgment of the court, stated the facts substantially as set out above, read the relevant paragraphs of reg. 56A, referred to interlocutory matters which do not call for report, and continued:—The defendant, on whom the onus rests of establishing the illegality, put his case in this way. He said that the plaintiff was on the horns of a dilemma: either the licence which was granted to the tenant had been transferred to the defendant, in which case there was a breach of a condition of the licence attracting a penalty under para. 8 of the regulation, or the licence was still vested in the tenant, in which event there was no licence within the meaning of para. 2 of the regulation, and in either case the contract was rendered illegal.

We can deal shortly with the first of these two contentions. We see no evidence whatever to support the view that there had been a transfer of the licence. Had there been such a transfer we should still have entertained some doubt whether the defendant could succeed. This question was considered in *Bostel Bros. Ld.* v. *Hurlock* (12). In that case the question at issue was work done in excess of the licensed cost. Mr. Beney (13) advanced the argument that, if the limit of cost is a condition or limitation attachable to a licence under para. 7 of the regulation, so that work done at an excess cost is a breach of condition within para. 8, the only result is that the builders are liable to prosecution, but the legality of the work is unaffected. He relied, in particular, on the words in para. 8, "whether or not "the authorization or licence is revoked" as showing that para. 8 was not intended to affect the validity of the licence. This court decided against the builders on the ground that work done in excess of cost is work done without a licence and, therefore, prima facie contravenes para. 2 and is not merely a breach of condition bringing para. 8 into operation. The headnote records the court as saying that a breach of condition merely gives rise to liability to a penalty under para. 8. We are unable to find anything in the judgment supporting this statement in the headnote. None the less, the opinion that a breach of condition which does not involve a breach of paras. 1 and 2 only attracts a penalty under para. 8 and does not per se invalidate the licence is attractive for the reasons advanced by Mr. Beney in the case cited, and for the further reason that, if Mr. Lester, for the defendant, were to succeed on this part of his argument, it would mean that a builder might be deprived of his right to recover for work done, by reason of a transfer of a licence effected without his knowledge and which he had no reason to suspect.

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(12) [1949] 1 K. B. 74.

(13) Ibid. 77.

Mr. Lester's second point presents more difficulty. He has to admit that no work has been done which was not authorized by the licence, but he says that a licence cannot exist, so to speak, in vacuo, that it must be granted to someone, and that it is implicit in para. 2 of the regulation that the work must be done under a licence in the name of the person at whose expense the work is to be carried out, that being the person who may be liable to a penalty under para. 6.

He relies on the principles laid down by this court in *Mahmoud* v. *Ispahani* (14). The regulation there in question was the Seeds, Oils and Fats Order, 1919, which prohibited the making of a contract of sale or purchase of specified articles including linseed oil unless buyer and seller each had a licence. The plaintiff had the requisite licence and was led by the misrepresentation of the defendant to the honest belief that the defendant also had a licence. The defendant in fact had not, and knew he had not, a licence. He refused to take delivery of the linseed on the ground that the contract was illegal as he had no licence. The defence prevailed. Scrutton, L.J., began (15) by pointing out that, when considering a case of this kind, the court is not concerned with the commercial or business merits of the parties. If it were, he said, " There is obviously a great deal to " be said for the commercial and business merits of the plaintiff " and nothing whatever for the commercial and business merits " of the defendant ". The same is at least equally true in the case now before us. He states the reasons for the decision (16): " As I understand, two reasons are given why in this case the " court should enforce this contract. First of all, it is said that " the court will not listen to a person who says, 'Protect me from " 'my own illegality'. In my view the court is bound, once it " knows that the contract is illegal, to take the objection and to

(14) [1921] 2 K. B. 716.
(15) [1921] 2 K. B. 716, 726.
(16) [1921] 2 K. B. 716, 729.

"refuse to enforce the contract, whether its knowledge comes "from the statement of the party who was guilty of the illegality, "or whether its knowledge comes from outside sources. The "court does not sit to enforce illegal contracts. There is no "question of estoppel; it is for the protection of the public that "the court refuses to enforce such a contract".

That, says Mr. Lester, is applicable here. Mr. Campbell, however, relies on the next sentence, which reads: "The other "point is that, where a contract can be performed lawfully or "unlawfully, and the defendant without the knowledge of the "plaintiff elects to perform it unlawfully, he cannot plead its "illegality". Here, says Mr. Campbell, the contract could have been performed legally since the defendant could have performed the contract lawfully by scrapping the old licence and getting a new licence in the names of the tenant and himself. That argument seems to us to fail in limine since there was no contract by the defendant to obtain a licence, but merely a false representation that he had one. Moreover, acceptance of Mr. Campbell's argument on this point would make evasion of the regulation too easy. If it is necessary that the name of the person or persons at whose expense the work is being done should be in that licence, we think that the onus is on the builder to see that it is there.

In this connexion, the observations of Denning, L.J., in *Dennis* (*J.*) *& Co. Ld.* v. *Munn* (17), though directed to the question of authorized work, seem to us in point. Denning, L.J., said: "They must not simply take the owner's word that there "is a licence. They should ask to see it. If they do not do so, "and it turns out that he has no licence at all, they have acted "illegally and can recover nothing. They cannot recover even "the amount permitted by the free licence, because they did not "act under it and could not act under it". That refers to the facts of that particular case. "The work done here was more "extensive than that permitted by the licence. Of course, if the "employer knowingly deceives them, they may have an action "for fraud on that account; but nothing of that kind can be "suggested here". It is equally true that here there is no claim for fraud. We have therefore no case of fraud to deal with and we do not think that it necessarily follows from the facts of this case that fraud is involved.

(17) [1949] 2 K. B. 327, 332.

We are, however, unable to accept Mr. Lester's argument that the work has been done in breach of para. 2 of the regulation. The regulation imposes a penalty, and we are directed by the House of Lords that, in construing such a regulation, we must not hold that the regulation has been infringed unless the breach is clearly established. The principles applicable were clearly stated by Lord Simonds in *London and North Eastern Railway Company* v. *Berriman* (18): "That rule of construction is very "well settled; though not always easy of application. I will "state it by three familiar citations. In *Tuck & Sons* v. "*Priester* (19), Lord Esher, M.R., said: 'We must be very "'careful in construing that section, because it imposes a "'penalty. If there is a reasonable interpretation which will "'avoid the penalty in any particular case, we must adopt that "'construction. If there are two reasonable constructions we "'must give the more lenient one. That is the settled rule for "'the construction of penal sections'. Lindley, L.J., in the "same case, said (20): '. . . the well-settled rule that the court "'will not hold that a penalty has been incurred, unless the "'language of the clause which is said to impose it is so clear "'that the case must necessarily be within it'. Finally I will "cite the words of James, L.J., delivering the judgment of the "Privy Council in *Dyke* v. *Elliott* (21): 'Where the thing is "'brought within the words and within the spirit, there a penal "'enactment is to be construed, like any other instrument, "'according to the fair common-sense meaning of the language "'used, and the court is not to find or make any doubt or "'ambiguity in the language of a penal statute where such "'doubt or ambiguity would clearly not be found or made in the "'same language in any other instrument'.

"It was suggested, my Lords, that some distinction is to be "made in the application of this rule according to the avowed "purpose of the Act. It would, I think, be unfortunate if any "decision of this House gave any colour to such a suggestion. "Wherever the legislature prescribes a duty and a penalty for "the breach of it, it must be assumed that the duty is prescribed "in the interests of the community or some part of it and the "penalty is prescribed as a sanction for its performance. "Whether the purpose is, as it was in *Tuck & Sons* v. "*Priester* (22), the protection of copyright, or, as in the case

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(18) [1946] A. C. 278, 313.
(19) (1887) 19 Q. B. D. 629, 638.
(20) 19 Q. B. D. 629, 645.
(21) (1872) L. R. 4 P. C. 184, 191.
(22) 19 Q. B. D. 629.

"before your Lordships, the protection of the life and limb of "certain workers, the same principle prevails. A man is not to "be put in peril upon an ambiguity, however much or little the "purpose of the Act appeals to the predilection of the court". That was a Factory Act case but the principle is applicable to the case before us.

In para. 2 of the regulation there is no express provision prohibiting the doing of the work unless the person or the persons at whose expense the work is being done is or are named in the licence. Mr. Lester says that the standard form of application indicates that this should be implied. We doubt whether if we looked at the application form we should reach that conclusion. Be that as it may, we do not think that in determining whether there is a breach of the regulation we can look at the application form: *Rex* v. *Barnet etc. Rent Tribunal; Ex parte Reeds Investments Ld.* (23).

Mr. Lester then suggested that, unless that implication were made, there was a great opportunity for evasion. He propounded an imaginary case where a landlord of tenement flats obtained a licence for work on four flats at a total cost of 80*l*. The tenants of each flat then did work covered by the licence, but the aggregate cost of the work done by them exceeded 80*l*. In those circumstances, Mr. Lester suggested, no one could be prosecuted unless the implication for which he contended were made. It is, of course, extremely unlikely that such a thing would occur; but if it did, we think, the court would have no difficulty in holding that the work must be looked at as a whole and that all four tenants were liable to a penalty.

We are, however, of opinion that there is strong reason for not making the implication. The policy of the regulation is to prevent work of a kind or at a cost not covered by a licence, or, we think, for a purpose not covered by a licence. We do not consider that this policy requires that the name of the person paying for the work should be stated in the licence. On the other hand, it seems to us natural to impose the penalty on the person at whose expense the work is being done, since he must be in a position to control the builder and prevent unauthorized work from being done. We can find no justification for reading into the penal provisions of para. 2 of this regulation, words which it does not contain.

(23) 48 L. G. R. 656.

C. A.
1951
WOOLFE
v.
WEXLER.

We may perhaps point out that, if Mr. Lester's point were well-founded, it could have been taken by the defendant in *Bostel Bros. Ld.* v. *Hurlock* (24), since the licence in that case had been granted to a Mrs. Pierson, not the defendant Hurlock. The point, however, was not taken, and we cannot therefore treat that case as an authority binding on us.

We would add that we can hardly imagine a case more plainly outside the mischief which the regulation was framed to prevent than this: the work was authorized work; it was being done to meet the requirements of the person to whom the licence was granted, and the cost of the work was being paid in part by the licensee. In those circumstances we are glad to have been able to reach the conclusion that we are not required to hold that the enforcement of the contract would be against public policy.

Appeal dismissed.

Solicitors: *Thomas & Edwards; Howard, Kennedy & Co.*

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(24) [1949] 1 K. B. 74.

C. A.
1950
Dec. 11, 12, 13, 14, 15.
1951
Jan. 26.
Cohen, Asquith and Denning, L.JJ.

CANDLER *v.* CRANE, CHRISTMAS & CO.

[1949 C. No. 202.]

Tort—Accountants—Careless misrepresentation—Damage to third party —Whether action maintainable.

The plaintiff was considering the possibility of his investing 2,000*l.* in a limited liability company, but, before deciding to do so, desired to see the accounts of the company. The managing director of the company accordingly instructed the defendants, the accountants of the company, who were getting out the accounts, to press on and complete them, informing a clerk of the accountants, who had been requested by them to prepare the accounts, that they were required to be shown to the plaintiff who to his knowledge was a potential investor in the company. The clerk accordingly prepared the accounts and at the request of the managing director showed them to and discussed them with the plaintiff who took a copy of them and submitted them to his own accountant for advice. As a result the plaintiff invested his money in the company. The accounts were carelessly prepared, contained numerous false statements and gave a wholly misleading picture of the state of the company, which was wound up within a year, the plaintiff losing the whole of his investment.

C. A.

1950, 1951

CANDLER
v.
CRANE,
CHRISTMAS
& Co.

In an action brought by the plaintiff against the defendants, Lloyd-Jacob, J., found that the clerk was not guilty of fraud, but had been "extremely careless in the preparation of the accounts", and that the resulting damage to the plaintiff was plain. He held that the clerk had acted within the course of his employment, but dismissed the action on the ground that the defendants owed no duty of care to the plaintiff. On appeal by the plaintiff:—

Held, by the whole court that the clerk had acted in the course of his employment, but

Held, by Cohen and Asquith, L.JJ., following *Derry* v. *Peek* (1889) 14 App. Cas. 337, and *Le Lievre* v. *Gould* [1893] 1 Q. B. 491, Denning, L.J., dissenting, that a false statement, carelessly, as contrasted with fraudulently, made by one person to another, though acted on by that other to his detriment, was not actionable in the absence of any contractual or fiduciary relationship between the parties, and that this principle had in no way been qualified by the decision of the majority in *Donoghue* v. *Stevenson* [1932] A. C. 562. Accordingly the plaintiff's action failed.

Per Asquith, L.J. The principle laid down by Lord Atkin in *Donoghue* v. *Stevenson* [1932] A. C. 562, 580–1 in answer to the question: "Who then, in law, is my neighbour?" has never yet been applied where the damage complained of was not physical in its incidence to either person or property.

Per Denning, L.J. (dissenting). Accountants, exercising a calling which requires knowledge and skill, owed a duty to use care in the work, which resulted in their accounts and reports, and also in the rendering of their accounts and reports. They owed that duty not only to their clients with whom they had contracted, but to any third person to whom they showed their accounts and reports or to whom they knew that their clients were going to show them, when, to the knowledge of the accountants that person would consider their accounts and reports with a view to the investment of money or taking other action to his gain or detriment. The duty only extended in respect of those transactions for which the accountants knew that their accounts were required. ~~Surveyors, valuers~~ and analysts were under a similar duty. *Le Lievre* v. *Gould* (supra) was distinguishable on its facts.

APPEAL from Lloyd-Jacob, J.

In November, 1944, one Donald Ogilvie formed the Trevaunance Hydraulic Tin Mines Ld. to work certain surface tin workings in Cornwall, with himself as chairman and managing director for life. In March, 1946, he told Crane, Christmas & Co., accountants, that he wanted them to prepare the accounts of the company and to write up the books. The accountants entrusted the work to one of their clerks named Henry Fraser, but he had not done much towards the work when in June, 1946, Ogilvie told the accountants that he had decided "to go out for "substantially more capital" and asked them to insert an advertisement in *The Times* newspaper as quickly as possible. They arranged it for him, and it appeared on July 8, 1946, in these words: "10,000*l.* Established Tin Mine (low capitaliza-"tion) in Cornwall seeks further capital. Instal additional milling "plant. Directorship and active participation open to suitable "applicant—Apply", etc.

The plaintiff answered that advertisement in these words: "I "should be interested to take an active part in a Cornish tin "mine and have about 2,000*l.* to invest. Will you let me have "particulars?" The accountants sent that letter unopened to Ogilvie, who communicated with the plaintiff. As a result, in the first half of September, 1946, Ogilvie showed the plaintiff the Cornish workings and told him that if he invested 2,000*l.* he would get a directorship in the company and a service agreement for two years at 10*l.* a week. The plaintiff said, however, that he wanted to see the balance sheet of the company first.

As a result of this request, Ogilvie started pressing the accountants to get out the accounts. He told their clerk, Fraser, that he wanted the accounts got out as quickly as possible, and that the accounts were required to show to a potential investor in the company, whose name was Candler. Fraser was asked in the witness box: "Did you assume at that time that the "accounts that Mr. Ogilvie was pressing for had some relation "to his negotiations with Mr. Candler?", and he answered: "I "thought there would be a connexion, of course. Yes, I suppose "so".

Fraser accordingly, in the middle of September, 1946, worked on the accounts very intensively, going to Ogilvie's flat two or three times a day for his explanation of various items. He was, as the trial judge found, under the mistaken impression that it was, in substance, Ogilvie's business and he accepted Ogilvie's statements without verification.

On Monday, September 16, 1946, Ogilvie asked Fraser to meet the plaintiff the next day so as to give him information relating to the accounts of the company; and accordingly on Tuesday, September 17, 1946, Fraser went with Ogilvie to meet the plaintiff and took with him the draft accounts which he had by that time prepared. At the meeting Ogilvie introduced Fraser to the plaintiff as the representative of Crane, Christmas & Co., the accountants and auditors of the company who were preparing the accounts, and he introduced the plaintiff to Fraser as a man who was contemplating an investment in the company. Fraser knew of the advertisement which his firm had inserted for new capital; and he knew that the negotiations depended on the plaintiff's being satisfied with the balance sheet of the company.

At this meeting on September 17, 1946, Fraser produced the draft accounts. They had already, at that time, with them a certificate ready for signature by the accountants, saying in the usual formula: " We have audited the balance sheet as above " set forth. We have obtained all the information and explana- " tions we have required and we report that such balance sheet " is in our opinion properly drawn up so as to exhibit a true and " correct view of the state of the company's affairs, according to " the best of our information and the explanations given to us " and as shown by the books of the company ". That certificate was not signed at the time; but Fraser told the plaintiff that that certificate would be signed with a clear docket, subject to one or two small alterations which he wished to consider for another two or three days.

The plaintiff took down in his own handwriting a copy of the accounts, because he wanted to put them before his own accountant for advice. There was a conflict of recollection as to how he came to take them down, but the trial judge said that it did not matter because Fraser clearly assented to the plaintiff's taking a copy. The judge said: " Having regard to the fact that " Fraser was plainly aware of the purpose for which the draft " accounts were required, I entertain no doubt at all that he was " aware of and acquiesced in the showing of these accounts to " the plaintiff: indeed, the meeting would have been wholly " pointless but for that purpose ". Fraser drew the plaintiff's attention to the fact that some of the items in the draft balance sheet might need revision and the parties arranged to meet again on September 20, 1946. The judge expressly found that, when the meeting of the 17th broke up, Fraser must have been satisfied, not only that the plaintiff was considering an investment in the company, but that he was taking with him and relying on the draft accounts which he had prepared.

The three men did in fact meet again on September 20. By that time Fraser had concluded his examination of the books, and he drew the plaintiff's attention to some modifications which were for present purposes immaterial. Fraser said that the accounts had been passed by the directors and would be signed in the next few days. The plaintiff had meanwhile himself got advice from his own accountant and put queries to Fraser about the accounts which Fraser answered. Nothing now turned on those queries.

At the end of the meeting the plaintiff told Ogilvie and Fraser that he was satisfied and would invest 2,000*l*. in the company. He sent a cheque for 500*l*. that day to Ogilvie, and the balance of 1,500*l*. on September 25, 1946, for shares in the company.

The judge found that to Fraser's knowledge the plaintiff was induced to believe that the accounts, as modified on September 20, 1946, would be the certified accounts as they emerged from the accountants: and that is what did in fact happen. On September 27, 1946, the accounts were certified by the accountants in precisely the form in which Fraser had shown them to the plaintiff at the meeting of the 20th without any alteration at all.

In fact the accounts gave an altogether false picture of the position of the company. Instances were given in evidence which showed that there was no verification whatever by the accountants of the information which they were given by Ogilvie. Thus, among the assets were inserted "Freehold cottages (at "cost) 650*l*.". In fact the company had no title deeds for the cottages. The cottages stood in Ogilvie's name and he had mortgaged them to the bank for his own overdraft. Again, "Leasehold buildings at cost 650*l*.". The company had no leases, but they stood in Ogilvie's name and were ultimately forfeited for non-payment of rent. Further, the assets were said to include 3,280*l*. expended on capital development whereas the propriety of that figure depended on whether out of the total expenditure of the company a proper allocation had been made between capital and revenue expenditure; and the accounts contained no indication that any such allocation had been necessary, or had indeed been made. It appeared that much too high a figure was allocated to capital, thus making the assets appear larger than they in fact were. It was unnecessary, however, to pursue those criticisms of the accounts, because it was admitted that the accountants had entirely failed to use proper care and skill in the preparation and presentation of them.

The result was disastrous for the plaintiff. In September, 1946, he entered the service of the company, moved down to Cornwall and worked at the mine. Indeed he invested in November, 1946, another 200*l*. But a little later his suspicions became aroused, because he discovered that his 2,000*l*. had not been applied for the purposes of the company's business but that most of it had been withdrawn by Ogilvie for his own private purposes. Ultimately he discovered that the company was in a very bad way. It was not even able to pay his salary. He himself issued writs against the company on May 1, and June 30, 1947, for salary and money lent. On August 11, 1947, he presented a petition for winding up the company and on December 15, 1947, a winding-up order was made. There were no assets. The bank took the freehold cottages for Ogilvie's debt. The lessors forfeited the leasehold property. Ogilvie became a bankrupt. The plaintiff lost his 2,000*l*. altogether.

He therefore brought an action against Crane, Christmas & Co., the accountants, claiming that it was due to their carelessness that he had lost his money, because, if they had put before him accounts which had been properly prepared, the true position of affairs would have been disclosed and he would never have invested his money in the company.

Lloyd-Jacob, J., found that Fraser, in showing the accounts to the plaintiff, was acting in the course of his employment; that he had an implied authority to do so; that the accounts were " defective and deficient " and presented a position of the company which was " wholly contrary to the actual position "; that the accountants, although not guilty of fraud, were " in fact " extremely careless in the preparation of the accounts "; and that the damage suffered by the plaintiff was plain. But he dismissed the action because, in his opinion, in the absence of fraud there was no duty of care owed by the accountants, the defendants, to the plaintiff.

The plaintiff appealed.

Neil Lawson for the plaintiff. The trial judge found that there was no fraud on the part of the defendants or their employee Fraser, and that finding is not contested on the appeal. On the other issue, that there was no duty of care owed by the accountants, the defendants, to the plaintiff and that, accordingly, he had no cause of action, the plaintiff appeals. On that issue the judge misdirected himself. The judge was right in finding that Fraser, in showing the accounts of the company to the plaintiff, was acting in the course of his employment and that he had implied authority to do so. Fraser was acting within his ostensible authority.

But the judge was wrong in holding that Fraser and the defendants owed no duty of care to the plaintiff. Although there was no contract between the plaintiff and the defendants, the relationship between them was so close and direct that the defendants owed him a duty of care within the principle of "proximity" stated by Lord Atkin in *Donoghue* v. *Stevenson* (1) It is submitted that the effect of the decision of the majority in that case is far wider than that suggested by the terms of the headnote. The plaintiff, in the case before the court, was a person who was so closely and directly affected by Fraser's act that Fraser ought reasonably to have had him in contemplation, as being so affected, when he was directing his mind to the act called in question. Fraser admitted that he knew that the plaintiff was considering whether he should invest in this company, and he knew that showing to him these accounts was likely to affect the plaintiff's mind on this issue. As Lord Atkin said (2), "This appears to me to be the doctrine of *Heaven* v. "*Pender* (3) . . . when it is limited by the notion of proximity "introduced by Lord Esher himself and A. L. Smith, L.J., in "*Le Lievre* v. *Gould*" (4).

Lloyd-Jacob, J., in his judgment relied on the decision in *Le Lievre* v. *Gould* (4); but this case is distinguishable. In *Le Lievre* v. *Gould* (4) the mortgagees said that the owner's surveyor owed a duty of care to them; but they could have had the work surveyed by their own surveyor and actually stipulated for it. Since the inspection of an intermediate person might reasonably have been interposed, the relationship was too remote to raise a duty of care. The decision in that case is not challenged, since it does not affect the facts in the case before the court. The facts in *Cann* v. *Willson* (5) approximate very closely to those now before the court, and the Court of Appeal in *Le Lievre* v. *Gould* (4) held that *Cann* v. *Willson* (5) was overruled. This was due to the error which persisted from 1889 to 1914 that no action ever lay for a negligent statement even though it was intended to be acted on by the plaintiff and was in fact acted upon by him: this view was based on a mistaken view of the decision in *Derry* v. *Peek* (6), and was shown to be wrong in *Nocton* v. *Ashburton* (7), which decided that an action did lie for a negligent statement where the circumstances disclosed a duty to be careful. The reason put forward for saying that *Cann* v. *Willson* (8) was not good law was removed by the decision in *Nocton* v. *Ashburton* (9). The necessary proximity in the relationship of the parties existed in *Cann* v. *Willson* (10), although it did not exist in *Le Lievre* v. *Gould* (11).

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(1) [1932] A. C. 562.
(2) [1932] A. C. 580–1.
(3) (1883) 11 Q. B. D. 503, 509.
(4) [1893] 1 Q. B. 491, 497, 504.
(5) (1888) 39 Ch. D. 39.
(6) (1889) 14 App. Cas. 337.
(7) [1914] A. C. 932.
(8) 39 Ch. D. 39.
(9) [1914] A. C. 932.

When *Cann* v. *Willson* (10) was said to be no longer law in *Le Lievre* v. *Gould* (11), the general view was that *George* v. *Skivington* (12) (on which Chitty, J., relied in his decision of *Cann* v. *Willson* (10)) was wrongly decided: see the judgments of Field and Cave, JJ., and Bowen and Cotton, L.JJ., in *Heaven* v. *Pender* (13), and of Hamilton, J., in *Blacker* v. *Lake and Elliott* (14). But in *Donoghue* v. *Stevenson* (15) the House of Lords approved *George* v. *Skivington* (12). The decision in *Cann* v. *Willson* (10) may therefore on that ground also be said to have been restored as good law. As to subsequent applications of the principle laid down by Lord Atkin in *Donoghue* v. *Stevenson* (15), see *Haseldine* v. *C. A. Daw & Son Ld.* (16) and *Denny* v. *Supplies and Transport Co. Ld.* (17).

Derry v. *Peek* (18) is a decision only on the issue of fraud. The claim was only on the action for deceit. In any case the prospectus in *Derry* v. *Peek* (18) was addressed to all the world: in the case before the court, the statements of Fraser were addressed to the plaintiff in particular, and this fact shows that the decision in *Derry* v. *Peek* (18) has no bearing on the present issue.

The plaintiff's damages under this cause of action were the 2,000*l.* which he invested in the shares of this company after his examination of the accounts of the company made out by the defendants. Once the plaintiff had become a shareholder in the company, the defendants, as the auditors of the company, owed him a duty as a shareholder to give him accurate information as to the accounts of the company: the defendants let him remain under the impression which he had already derived from the accounts which they had placed before him when he was a prospective investor. On this ground also they are liable to the plaintiff in damages.

John Foster, *K.C.*, and *Phineas Quass* for the defendants. The trial judge found that Fraser, in presenting the accounts to the plaintiff, was acting within the scope of his authority. That was not so: he was authorized merely to prepare the accounts for subsequent submission by the defendants to Ogilvie under the contract made between Ogilvie and the defendants. It is a fallacy to assume that what the principal can do is necessarily within the scope of the authority of the agent or servant. The principals gave Fraser no authority to show their accounts or to make any representation to a person who was not a party to the contract, and there was no implied authority that he should do so.

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(10) 39 Ch. D. 39.
(11) [1893] 1 Q. B. 491.
(12) (1869) L. R. 5 Ex. 1.
(13) (1882) 9 Q. B. D. 302, 306–7; (1883) 11 Q. B. D. 503, 516–17.
(14) (1912) 106 L. T. 533.
(15) [1932] A. C. 562.
(16) [1941] 2 K. B. 343.
(17) [1950] 2 K. B. 374.
(18) 14 App. Cas. 337.

It is obvious that this is a matter which must be carefully considered in each case by the principals. This litigation shows that. Fraser's authority is determined by his principals and the evidence of the head of the firm is conclusive on that issue. Fraser had no such authority. It was not part of Fraser's duties to advise prospective investors in this company. The question at issue is what Fraser was employed by his principals to do. Further, there was no finding by the judge what was the scope of Fraser's employment.

The duty to be careful in making statements arises only out of a contractual duty or from a fiduciary relationship: see *Nocton* v. *Ashburton* (19). The argument for the plaintiff necessarily postulates this proposition, that if the plaintiffs in *Derry* v. *Peek* (18) had sued alleging negligence, instead of deceit, they would have succeeded; but there is not a word in the speeches of the Law Lords to suggest that this is so. In effect, the House of Lords said that there was no such duty of care as is claimed here by the plaintiff. Lord Shaw in *Nocton* v. *Ashburton* (19) approved this observation of Bowen, L.J., on *Low* v. *Bouverie* (20): " *Derry* v. *Peek* (18) decides that in cases such as those " of which that case was an instance, there is no duty enforceable " at law to be careful in the representation which is made. " Negligent misrepresentation does not certainly amount to deceit, " and negligent misrepresentation can only amount to a cause of " action, if there exist a duty to be careful—not to give informa- " tion except after careful inquiry. In *Derry* v. *Peek* (18) the " House of Lords considered that the circumstances raised no " such duty. It is hardly necessary to point out that, if the " duty is assumed to exist, there must be a remedy for its non- " performance, and that, therefore, the doctrine that negligent " misrepresentation affords no cause of action is confined to cases " in which there is no duty, such as the law recognizes, to be " careful ". See also the statements of Kay, L.J., as to the result of the authorities in *Low* v. *Bouverie* (20a). The court is apparently invited to say that the observations of Lord Atkin in

(18) 14 App. Cas. 337.
(19) [1914] A. C. 932, 971.
(20) [1891] 3 Ch. 82, 105.
(20a) [1891] 3 Ch. 82, 111.

Donoghue v. *Stevenson* (21) have reversed what has hitherto been regarded as established law. Lord Atkin's observations must be considered in the light of the facts in *Donoghue* v. *Stevenson* (21).

[DENNING, L.J. Take the case of an analyst who carelessly certifies to a manufacturer of food that an ingredient is harmless, when it is not so, or of an inspector of lifts who carelessly reports that a particular lift is safe, when it is not: would the customer poisoned or the passenger injured have an action against the analyst in the one case and the inspector in the other?]

The authorities show that the duty to take care only arises where the result of a failure in that duty leads to damage either to person or to property, e.g., *Donoghue* v. *Stevenson* (21) (person) and *Haseldine* v. *C. A. Daw & Son Ld.* (22) (property). If a negligent statement, made for the information of those interested, is published in a book with issues all over the world, it may be that the publisher would have a remedy, but not the reader. The position is very different where the defendant issues one defective article. There was no duty of care here owed by the defendants to the plaintiff: see *Le Lievre* v. *Gould* (23), *Humphery* v. *Bowers* (24), and *Australian Steam Shipping Co. Ld.* v. *Devitt* (25).

[DENNING, L.J. It would seem from Lord Atkin's words in *Donoghue* v. *Stevenson* (26) that in every particular case the issue is whether there was sufficient proximity.]

The reasonable care required can only be ascertained by having regard to the contract between the parties.

[DENNING, L.J. It would appear that the negligently made statement which is false must be made to the plaintiff, and that the defendant must intend or know that the plaintiff will act on it.]

If that were so *Derry* v. *Peek* (27) would be a stronger case than that before the court. Charlesworth in his book on the Law of Negligence (2nd ed.), at p. 16, writes: "To regard the issue "of a certificate, an opinion, or a report as carrying the same "duty of care as the delivery of a defective chattel would be to "introduce a most disturbing factor into the material intercourse "of society". If it is suggested that the decision in *Le Lievre* v. *Gould* (28) can be distinguished, because there is more "proximity" in this case, that does not overcome the difficulty

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(21) [1932] A. C. 562.
(22) [1941] 2 K. B. 343.
(23) [1893] 1 Q. B. 491.
(24) (1929) 45 T. L. R. 297.
(25) (1917) 33 T. L. R. 178.
(26) [1932] A. C. 562.
(27) 14 App. Cas. 337.
(28) [1893] 1 Q. B. 491.

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raised by the doctrine in *Derry* v. *Peek* (29). If this appeal were allowed, it might lead to actions for negligence being based on a casual conversation: see *Fish* v. *Kelly* (30). [*Thompson* v. *Schmidt* (31), *Angus* v. *Clifford* (32), and *Love* v. *Mack* (33), referred to.] In Salmond on the Law of Torts (10th ed.), p. 580, the editor states: " A false statement is not actionable as a tort, " unless it is wilfully false. Mere negligence in the making of " false statements is not actionable either as deceit or as any " other kind of tort ". Winfield in his Textbook of the Law of Tort (4th ed.), pp. 386–7, also recognizes that this is the law.

There is no adverse criticism of the decision of *Le Lievre* v. *Gould* (34) in *Donoghue* v. *Stevenson* (35), though that decision is mentioned in Lord Atkin's speech.

Lastly, the trial judge was right in holding that no damage flowed from the breach of such duty or was owed by the defendants, as auditors, to the plaintiff as a shareholder.

Neil Lawson in reply. In *George* v. *Skivington* (36), a case tried on demurrer, the declaration averred that the defendant put into circulation, knowing it was intended to be used by the purchaser's wife, a negligently compounded and deleterious hairwash; but the declaration also averred that the defendant had said that the hairwash was safe. It was held that the declaration disclosed a good cause of action. And that decision was approved in *Donoghue* v. *Stevenson* (35). If reliance is placed on *Derry* v. *Peek* (37), Lord Herschell, when deciding that the defendants were not liable for a non-fraudulent misrepresentation, excluded the case (38): " Where a person, within whose special province " it lay to know a particular fact, has given an erroneous answer " to an inquiry made with regard to it by a person desirous of " ascertaining the fact for the purpose of determining his course ".

Cur. adv. vult.

1951. Jan. 26. The following judgments were read:—

DENNING, L.J. [who was asked to read his judgment first]. This case raises a point of law of much importance; because Mr. Lawson on behalf of the plaintiff submitted that, although there was no contract between the plaintiff and the accountants, nevertheless the relationship between them was so close and direct that the accountants did owe a duty of care to him within the principles stated in *Donoghue* v. *Stevenson* (39); whereas Mr. Foster on behalf of the accountants submitted that the duty owed by the accountants was purely a contractual duty owed by them to the company, and therefore they were not liable for negligence to a person to whom they were under no contractual duty. [His Lordship then stated the facts as already set out. He continued:—] The only defences raised by the accountants at the hearing of the appeal were: (1.) that Fraser was not acting in the course of his employment; and (2.) that, even if he were, they owed no duty of care to the plaintiff.

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(29) 14 App. Cas. 337.
(30) (1864) 17 C. B. (N.S.) 194.
(31) (1891) 8 T. L. R. 120.
(32) [1891] 2 Ch. 449.
(33) (1905) 93 L. T. 352.
(34) [1893] 1 Q. B. 491.
(35) [1932] A. C. 562.
(36) (1869) L. R. 5 Ex. 1.
(37) 14 App. Cas. 337.
(38) Ibid. 360.

The judge appears to have treated it as beyond question that Fraser was acting in the course of his employment; and I agree with him. There is no doubt that Fraser was acting within his actual authority in writing up the books and preparing the accounts, and indeed his action in so doing was ratified and confirmed by the senior partner who signed the certificate; but it is said that Fraser had no authority to show the draft accounts to the plaintiff or to answer his queries, at any rate not without asking his principals for permission to do so. The senior partner admitted that it was a very common thing for accountants at the request of the chairman or person in control of a company to give details of the company's accounts to a prospective investor so as to induce him to invest money, but he said that it was for the principal of the firm to do it, and not for a clerk. That may well be so. It may not have been within Fraser's actual authority, but that is not the point. A master is often made responsible for the unauthorized or forbidden acts of his servant, when he has for his own purposes put the servant in a position where he can do the acts. Practical good sense demands that, even though the master is not at fault himself, he should be responsible if the servant conducts himself in a way which is injurious to others. He takes the benefits of the servant's rightful acts and should bear the burden of his wrongful ones; and he is, as a rule, the only one who has the means to pay. So here, I have no doubt that the accountants are responsible for the way in which Fraser conducted himself in preparing the accounts and showing them to the plaintiff who, after all, was perfectly innocent in the matter and had not the slightest idea that Fraser had no authority to do what he did.

(39) [1932] A. C. 562.

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Now I come to the great question in the case: did the accountants owe a duty of care to the plaintiff? If the matter were free from authority, I should have said that they clearly did owe a duty of care to him. They were professional accountants who prepared and put before him these accounts, knowing that he was going to be guided by them in making an investment in the company. On the faith of those accounts he did make the investment, whereas if the accounts had been carefully prepared, he would not have made the investment at all. The result is that he has lost his money. In the circumstances, had he not every right to rely on the accounts being prepared with proper care; and is he not entitled to redress from the accountants on whom he relied? I say that he is, and I would apply to this case the words of Knight Bruce, L.J., in an analogous case ninety years ago: "A country whose administration of justice did "not afford redress in a case of the present description would not "be in a state of civilization": *Slim* v. *Croucher* (40).

Turning now to authority, I can point to many general statements of principle which cover the case made by some of the great names in the law: Lord Eldon, L.C., in *Evans* v. *Bicknell* (41), Lord Campbell, L.C., in *Slim* v. *Croucher* (42), Lord Selborne, L.C., in *Brownlee* v. *Campbell* (43), Lord Herschell in *Derry* v. *Peek* (44), Lord Shaw in *Nocton* v. *Ashburton* (45), and Lord Atkin in *Donoghue* v. *Stevenson* (46). But it is said that effect cannot be given to these statements of principle, because there is an actual decision of this court in 1893 which is to the contrary, namely *Le Lievre* v. *Gould* (47).

Before I consider the decision in *Le Lievre* v. *Gould* (47) itself, I wish to say that, in my opinion, at the time it was decided current legal thought was infected by two cardinal errors. The first error was one which appears time and time again in nineteenth century thought, namely, that no one who is not a party to a contract can sue on it or on anything arising out of it. This error has had unfortunate consequences both in the law of contract and in the law of tort. So far as contract is concerned, I have said something about it in *Smith* v. *River Douglas Catchment Board* (48). So far as tort is concerned, it led the lawyers of that day to suppose that, if one of the parties to a contract was negligent in carrying it out, no third person who was injured by that negligence could sue for damages on account of it: see *Winterbottom* v. *Wright* (49), *Alton* v. *Midland Ry.* (50), and the notes to *Pasley* v. *Freeman* in 2 Smith's Leading Cases (51); except in the case of things dangerous in themselves, like guns: see *Dixon* v. *Bell* (52). This error lies at the root of the reasoning of Bowen, L.J., in *Le Lievre* v. *Gould* (53), when he said that the law of England " does not consider that what a man writes " on paper is like a gun or other dangerous instrument ", meaning thereby that, unless it was a thing which was dangerous in itself, no action lay. This error was exploded by the great case of *Donoghue* v. *Stevenson* (54), which decided that the presence of a contract did not defeat an action for negligence by a third person, provided that the circumstances disclosed a duty by the contracting party to him.

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(40) (1860) 1 De G. F. & J. 518, 527.

(41) (1801) 6 Ves. Jun. 173, 183.

(42) (1860) 1 De G. F. & J. 518, 523.

(43) (1880) 5 App. Cas. 925, 935–6.

(44) (1889) 14 App. Cas. 337, 360.

(45) [1914] A. C. 932, 972.

(46) [1932] A. C. 562, 580–1.

(47) [1893] 1 Q. B. 491.

(48) [1949] 2 K. B. 500, 514–17.

The second error was an error as to the effect of *Derry* v. *Peek* (55), an error which persisted for thirty-five years at least after the decision, namely, that no action ever lies for a negligent statement even though it is intended to be acted on by the plaintiff and is in fact acted on by him to his loss. This error led the Court of Appeal in *Low* v. *Bouverie* (56) to deny the correctness of *Slim* v. *Croucher* (57); and in *Le Lievre* v. *Gould* (58) to deny the correctness of *Cann* v. *Willson* (59). The cases thus denied were so plainly just that the very denial of them was itself an error. The error was, however, exposed by the important case of *Nocton* v. *Ashburton* (60), which decided that an action did lie for a negligent statement where the circumstances disclosed a duty to be careful; and that all that is to be deduced from (though not decided by) *Derry* v. *Peek* (61), is that *in the particular circumstances of that case* there was no duty to be careful. Lord Haldane observed significantly (62) that the authorities subsequent to *Derry* v. *Peek* (61) had shown " a tendency to assume that it was intended to mean more than " it did ".

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(49) (1842) 10 M. & W. 109.
(50) (1865) 19 C. B. (N.S.) 213.
(51) 13th ed., 1929, at pp. 103–10; (1789) 3 Term. Rep. 51.
(52) (1816) 5 M. & S. 198.
(53) [1893] 1 Q. B. 491 at p. 502.
(54) [1932] A. C. 562.
(55) (1889) 14 App. Cas. 337.
(56) [1891] 3 Ch. 82.
(57) 1 De G. F. & J. 518.
(58) [1893] 1 Q. B. 491.
(59) (1888) 39 Ch. D. 39.
(60) [1914] A. C. 932.
(61) 14 App. Cas. 337.
(62) [1914] A. C. 932, 947.

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In my opinion these decisions of the House of Lords in *Donoghue* v. *Stevenson* (63) and *Nocton* v. *Ashburton* (60) are sufficient to entitle this court to examine afresh the law as to negligent statements, and that is what I propose to do.

Let me first be destructive and destroy the submissions put forward by Mr. Foster. His first submission was that a duty to be careful in making statements arose only out of a contractual duty to the plaintiff or a fiduciary relationship to him. Apart from such cases, no action, he said, had ever been allowed for negligent statements, and he urged that this want of authority was a reason against it being allowed now. This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases of *Ashby* v. *White* (64), *Pasley* v. *Freeman* (65) and *Donoghue* v. *Stevenson* (66) you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed. Whenever this argument of novelty is put forward I call to mind the emphatic answer given by Pratt, C.J., nearly two hundred years ago in *Chapman* v. *Pickersgill* (67) when he said: "I wish never to hear this "objection again. This action is for a tort: torts are infinitely "various; not limited or confined, for there is nothing in nature "but may be an instrument of mischief". The same answer was given by Lord Macmillan in *Donoghue* v. *Stevenson* (68) when he said: "The criterion of judgment must adjust and adapt "itself to the changing circumstances of life. The categories of "negligence are never closed". I beg leave to quote those cases and those passages against those who would emphasize the paramount importance of certainty at the expense of justice. It needs only a little imagination to see how much the common law would have suffered if those decisions had gone the other way.

The second submission of Mr. Foster was that a duty to take care only arose where the result of a failure to take care will cause physical damage to persons or property. It was for this reason that he did not dispute two illustrations of negligent statements which I put in the course of the argument, the case of an analyst who negligently certifies to a manufacturer of food that a particular ingredient is harmless, whereas it is in fact poisonous, or the case of an inspector of lifts who negligently reports that a particular lift is safe, whereas it is in fact dangerous. The analyst and the lift inspector would, I should have thought, be liable to any person who was injured by consuming the food, or using the lift, at any rate if there was no likelihood of intermediate inspection: see *Donoghue* v. *Stevenson* (69); *Haseldine* v. *C. A. Daw & Son Ld.* (70). Mr. Foster said that that might well be so because the negligence there caused physical damage, but that the same would not apply to negligence which caused financial loss. He referred to some observations of Wrottesley, J., which were in his favour on this point: see *Old Gate Estates Ld.* v. *Toplis* (71). I must say, however, that I cannot accept this as a valid distinction. I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care; but, if once the duty exists, I cannot think that liability depends on the nature of the damage.

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(63) [1932] A. C. 562.

(64) (1703) 2 Ld. Raym. 938.

(65) (1789) 3 Term Rep. 51.

(66) [1932] A. C. 562.

(67) (1762) 2 Wilson 145, 146.

(68) [1932] A. C. 562, 619.

~~The third submission of Mr. Foster was~~ that the duty owed by the accountants was purely a contractual duty and therefore they were not liable for negligence to a person to whom they were under no contractual obligation. This seems to me to be simply a repetition of the nineteenth century fallacy which was stated in *Alton* v. *Midland Ry.* (72) and exploded by *Donoghue* v. *Stevenson* (69).

Let me now be constructive and suggest the circumstances in which I say that a duty to use care in statement does exist apart from a contract in that behalf. First, what persons are under such duty? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business. Their duty is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports. Herein lies the difference between these professional men and other persons who have been held to be under no duty to use care in their statements, such as promoters who issue a prospectus: *Derry* v. *Peek* (73) (now altered by statute), and trustees

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(69) [1932] A. C. 562.
(70) [1941] 2 K. B. 343.
(71) (1939) 161 L. T. 227.
(72) 19 C. B. (N.S.) 213.
(73) 14 App. Cas. 337.

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who answer inquiries about the trust funds: *Low* v. *Bouverie* (74). Those persons do not bring, and are not expected to bring, any professional knowledge or skill into the preparation of their statements: they can only be made responsible by the law affecting persons generally, such as contract, estoppel, innocent misrepresentation or fraud. But it is very different with persons who engage in a calling which requires special knowledge and skill. From very early times it has been held that they owe a duty of care to those who are closely and directly affected by their work, apart altogether from any contract or undertaking in that behalf. Thus Fitzherbert, in his new Natura Brevium (1534) 94D, says that: "If a smith prick my horse with a nail, I shall have my "action on the case against him, without any warranty by the "smith to do it well"; and he supports it with an excellent reason: "for it is the duty of every artificer to exercise his art "rightly and truly as he ought". This reasoning has been treated as applicable not only to shoeing smiths, surgeons and barbers, who work with hammers, knives and scissors, but also to shipbrokers and clerks in the Custom House who work with figures and make entries in books, "because their situation and "employment necessarily imply a competent degree of knowledge "in making such entries": see *Shiels* v. *Blackburne* (75), per Lord Loughborough, which was not referred to by Devlin, J., in *Heskell* v. *Continental Express Ld.* (76).

The same reasoning has been applied to medical men who make reports on the sanity of others: see *Everett* v. *Griffiths* (77). It is, I think, also applicable to professional accountants. They are not liable, of course, for casual remarks made in the course of conversation, nor for other statements made outside their work, or not made in their capacity as accountants: compare *Fish* v. *Kelly* (78); but they are, in my opinion, in proper cases, apart from any contract in the matter, under a duty to use reasonable care in the preparation of their accounts and in the making of their reports.

Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer they are not, as a rule, responsible for what he does with them without their knowledge or consent.

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(74) [1891] 3 Ch. 82.

(75) (1789) 1 H. Bl. 159, 162.

(76) [1950] 1 All E. R. 1033, 1042.

(77) [1920] 3 K. B. 163, 182, 217.

(78) (1864) 17 C. B. (N.S.) 194.

A good illustration is afforded by the decision in *Le Lievre* v. *Gould* (79) itself, which I certainly would not wish to call in question. The facts are somewhat differently stated in the various reports, but collecting them together they come to this: A surveyor there surveyed work for a building owner and handed certificates to him so that he could know the amounts which he had to pay the builder. The building owner then chose to show the certificates to his own mortgagees who advanced money on them instead of on the certificates of their own surveyor. The mortgagees then said that the owner's surveyor owed a duty of care to them. That was obviously untenable, because they should have had the work surveyed by their own surveyor. Indeed they had actually stipulated for it. The relationship was therefore one in which the inspection of an intermediate person might reasonably be interposed, and was consequently too remote to raise a duty of care: see per Lord Atkin in *Donoghue* v. *Stevenson* (80). But excluding such cases as those, there are some cases—of which the present is one—where the accountants know all the time, even before they present their accounts, that their employer requires the accounts to show to a third person so as to induce him to act on them: and then they themselves, or their employers, present the accounts to him for the purpose. In such cases I am of opinion that the accountants owe a duty of care to the third person.

The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him? That appears from the case of *Langridge* v. *Levy* (81) as extended by Cleasby, B., in *George* v. *Skivington* (82); and from the decision of that good judge, Chitty, J., in *Cann* v. *Willson* (83), which is directly in point. In that case a valuer made a valuation of property for the very purpose of enabling his client to raise a mortgage on it; and, in order to further the transaction, the valuer himself actually put the valuation before the mortgagee's solicitor saying that it was a very moderate valuation and not made in favour of the borrower. The mortgagee advanced money on the faith of the valuation, but it turned out that the valuer had been grossly careless, and the mortgagee lost his money. Chitty, J., held that the valuer was liable in negligence, apart from any contract at all. He said that the valuation was sent by the valuers direct to the mortgagee's solicitor "for the purpose of inducing the plaintiff "and his co-trustee to lay out the trust money on mortgage. It "seems to me that the defendants knowingly placed themselves "in that position, and in point of law incurred a duty towards "him to use reasonable care in the preparation of the document "called a valuation. I think it is like the case of the supply of "an article—the supply of the hairwash in the case of *George* v. "*Skivington* (82)".

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(79) [1893] 1 Q. B. 491.

(80) [1932] A. C. 562.

(81) (1837–8) 2 M. & W. 519; in Ex. Ch. 4 M. & W. 337.

(82) (1869) L. R. 5 Ex. 1, 5.

(83) (1888) 39 Ch. D. 39.

That reasoning seems to me to be good sense and good law. I know that in *Le Lievre* v. *Gould* (84) the Court of Appeal said that *Cann* v. *Willson* (85) was wrongly decided; but it must be remembered that at that time the general opinion of the profession was that the case of *George* v. *Skivington* (86), on which Chitty, J., relied, was itself wrongly decided, or at any rate that the principle stated in it by Cleasby, B., was wrong: see per Field and Cave, JJ., and Bowen and Cotton, L.JJ., in *Heaven* v. *Pender* (87), and per Hamilton, J., in *Blacker* v. *Lake and Elliott* (88). If *George* v. *Skivington* (86) was wrong, then, of course, *Cann* v. *Willson* (85) was wrong, for it was based on it. But in *Donoghue* v. *Stevenson* (89) the House of Lords fully restored *George* v. *Skivington* (86), and Lord Atkin himself approved the reasoning of Cleasby, B. (90). It seems to me that by so doing the House of Lords have implicitly restored *Cann* v. *Willson* (85), because they have restored the case on which it was based; and if *Cann* v. *Willson* (85) is good law it follows that in the present case the accountants owed a duty of care to the plaintiff, for the circumstances are indistinguishable.

Thirdly, to what transactions does the duty of care extend? It extends, I think, only to those transactions for which the accountants knew their accounts were required. For instance, in the present case it extends to the original investment of 2,000*l.* which the plaintiff made in reliance on the accounts, because the accountants knew that the accounts were required for his guidance in making that investment; but it does not extend to the subsequent 200*l.* which he made after he had been two months with the company. This distinction, that the duty only extends to the very transaction in mind at the time, is implicit in the decided cases. Thus a doctor, who negligently certifies a man to be a lunatic when he is not, is liable to him, although there is no contract in the matter, because the doctor knows that his certificate is required for the very purpose of deciding whether the man should be detained or not; but an insurance company's doctor owes no duty to the insured person, because he makes his examination only for the purposes of the insurance company: see *Everett* v. *Griffiths* (91), where Atkin, L.J., proceeds on the self-same principles as he expounded fully later in *Donoghue* v. *Stevenson* (92). So, also, a Lloyd's surveyor who, in surveying for classification purposes, negligently passes a mast as sound when it is not, is not liable to the owner for damage caused by it breaking, because the surveyor makes his survey only for the purpose of classifying the ship for the Yacht Register and not otherwise: *Humphery* v. *Bowers* (93). Again, a scientist or expert (including a marine hydrographer) is not liable to his readers for careless statements in his published works. He publishes his work simply for the purpose of giving information, and not with any particular transaction in mind at all. But when a scientist or an expert makes an investigation and report for the very purpose of a particular transaction, then, in my opinion, he is under a duty of care in respect of that transaction.

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(82) (1869) L. R. 5 Ex. 1, 5.
(84) [1893] 1 Q. B. 491.
(85) 39 Ch. D. 39.
(86) L. R. 5 Ex. 1.
(87) (1882) 9 Q. B. D. 302, 306–7; (1883) 11 Q. B. D. 503, 516–7.
(88) (1912) 106 L. T. 533
(89) [1932] A. C. 562.
(90) Ibid. 584–5.

It will be noticed that I have confined the duty to cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the very transaction in question. That is sufficient for the decision of this case. I can well understand that it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business, for that would expose him to "liability in "an indeterminate amount for an indeterminate time to an inde-"terminate class": see *Ultramares Corporation* v. *Touche* (94). per Cardozo, C.J. Whether he would be liable if he prepared his accounts for the guidance of a specific class of persons in a specific class of transactions, I do not say. I should have thought he might be, just as the analyst and lift inspector would be liable in the instances I have given earlier. It is perhaps worth mentioning that Parliament has intervened to make the professional man liable for negligent reports given for the purposes of a prospectus: see ss. 40 and 43 of the Companies Act, 1948. That is an instance of liability for reports made for the guidance of a specific class of persons—investors, in a specific class of transactions—applying for shares. That enactment does not help, one way or the other, to show what result the common law would have reached in the absence of such provisions; but it does show what result it ought to reach.

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(91) [1920] 3 K. B. 163, 211, 217.
(92) [1932] A. C. 562.
(93) (1929) 45 T. L. R. 297.
(94) (1931) 255 N. Y. Rep. 170; 174 North Eastern Reporter 441.

My conclusion is that a duty to use care in statement is recognized by English law, and that its recognition does not create any dangerous precedent when it is remembered that it is limited in respect of the persons by whom and to whom it is owed and the transactions to which it applies.

One final word: I think that the law would fail to serve the best interests of the community if it should hold that accountants and auditors owe a duty to no one but their client. Its influence would be most marked in cases where their client is a company or firm controlled by one man. It would encourage accountants to accept the information which the one man gives them, without verifying it; and to prepare and present the accounts rather as a lawyer prepares and presents a case, putting the best appearance on the accounts they can, without expressing their personal opinion of them. This is, to my way of thinking, an entirely wrong approach. There is a great difference between the lawyer and the accountant. The lawyer is never called on to express his personal belief in the truth of his client's case; whereas the accountant, who certifies the accounts of his client, is always called on to express his personal opinion as to whether the accounts exhibit a true and correct view of his client's affairs; and he is required to do this, not so much for the satisfaction of his own client, but more for the guidance of shareholders, investors, revenue authorities, and others who may have to rely on the accounts in serious matters of business. If we should decide this case in favour of the accountants there will be no reason why accountants should ever verify the word of the one man in a one-man company, because there will be no one to complain about it. The one man who gives them wrong information will not complain if they do not verify it. He wants their backing for the misleading information he gives them, and he can only get it if they accept his word without verification. It is just what he wants so as to gain his own ends. And the persons who are misled cannot complain because the accountants owe no duty to them. If such be the law, I think it is to be regretted, for it means that the accountants' certificate, which should be a safeguard, becomes a snare for those who rely on it. I do not myself think that it is the law. In my opinion accountants owe a duty of care not only to their own clients, but also to all those whom they know will rely on their accounts in the transactions for which those accounts are prepared.

I would therefore be in favour of allowing the appeal and entering judgment for the plaintiff for damages in the sum of 2,000*l*.

Asquith, L.J. On two points I entirely agree with the judgment delivered by Denning, L.J. I agree that the cause of action based on an alleged breach of duty occurring after the plaintiff became a shareholder cannot be made out if only because the damage relied on preceded the breach. I also agree, for the reasons he has given, that Fraser was clearly acting within the scope of his employment by the defendant firm in showing the draft accounts and giving certain other information to the plaintiff.

But I have the misfortune to differ from my brother on the more important point raised in this case. The point may be put in this way: assume that Fraser's negligent misrepresentations had been made by his employers, the partners in the defendant firm. Assume further, as the fact is, that there was no fraud and no contract or fiduciary relationship between them and the plaintiff. Would they, in those events, have been liable to the plaintiff in respect of damage incurred by him through acting on those negligent misrepresentations? The defendants say "No". They do not question that in the absence of fraud, contract and fiduciary relationship there are cases in which A may be under a legal obligation to B to use reasonable care for some purposes. Their proposition is that, under the conditions assumed in this case, the defendants were under no duty, sounding in tort, to the plaintiff to take care that their representations of fact should be true. They rely in support of this contention on *Le Lievre* v. *Gould* (95), a decision binding on this court. I agree with the trial judge in considering that authority to be conclusive in their favour, unless it can be shown to have been overruled or to be distinguishable.

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(95) [1893] 1 K. B. 491.

The plaintiff's case is that whatever may have been the position before *Donoghue* v. *Stevenson* (96), the rule applied by the majority of the House of Lords in that case necessarily involves the consequence that (even where fraud, contract and fiduciary relationship are absent) A will be liable to B for any negligent misrepresentations on which B acts to his detriment, provided always that there exists between A and B the necessary degree of so-called "proximity". It is argued for the plaintiff that there was sufficient proximity on the facts of this case.

It may make for clearness first to consider some of the authorities preceding *Donoghue's* case (96) (as for short I will call it); and, secondly, to inquire what difference, if any, that case has made. I do not think it useful to go back further than *Derry* v. *Peek* (97). In that case the plaintiff subscribed for shares in a limited company in reliance on a prospectus issued by the directors, who included the defendants. The prospectus contained a negligent misstatement made in good faith. The claim on the writ, as amended, was for damages for deceit, for that and nothing else. There was no independent alternative claim in respect of negligent or innocent misrepresentation. The Court of Appeal held that fraud would be sufficiently established by proof that the directors had no reasonable grounds for believing the statement they made. The House of Lords, reversing the Court of Appeal, held that this was not enough to constitute fraud. If the defendants believed what they said it mattered not how credulous they were or how groundless their belief. Fraud necessarily connoted dishonesty and no degree of mere stupidity could serve in its place. The case is therefore primarily, and, according to one view, solely, a decision on the meaning of the word "fraud", and is therefore not directly relevant to the main issue in the present case from which fraud, though originally alleged, has been eliminated. Nevertheless it is indirectly relevant and illuminating. For, although it does not decide in terms, it clearly assumes or implies that a merely negligent misrepresentation made by a director to potential subscribers for shares, on which some of them act to their detriment, affords the latter no remedy. The notion that *Donoghue's* case (98) was intended parenthetically or sub silentio to sweep away this substratum of *Derry* v. *Peek* (99) seems to me quite unconvincing.

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(96) [1932] A. C. 562.

(97) (1889) 37 Ch. D. 541; 14 App. Cas. 337.

(98) [1932] A. C. 562.

After the Court of Appeal had given its decision in *Derry* v. *Peek* (99), but before it had been reversed by the House of Lords, a case came up for determination at first instance on facts not materially distinguishable from those of the present case. In *Cann* v. *Willson* (100) Chitty, J., relying on the decision (then unreversed) of the Court of Appeal in *Derry* v. *Peek* (99), held that the plaintiff could recover damages in respect of a negligent but (according to what we now know the word "fraud" means) non-fraudulent misrepresentation. This was the view implicitly condemned by the House of Lords when *Derry* v. *Peek* (99) reached them; and *Cann* v. *Willson* (100) was consequently on this assumption expressly overruled by the Court of Appeal in *Le Lievre* v. *Gould* (101). As I have indicated, this last decision is binding on this court and disposes of the appeal, in my view, unless it can be shown (a) to have been overruled or (b) to be distinguishable.

I will deal with these points in turn, premising that the principle on which *Gould's* case (101) (to give it also a short name) was decided was, in the words of Lord Esher (102): "All "that he" (the defendant) "had done was to give untrue "certificates negligently. Such negligence, in the absence of "contract with the plaintiffs, can give no right of action at law "or in equity". Both he and Bowen, L.J., treated *Derry* v. *Peek* (99) as deciding not merely that fraud was not established in that case, but that nothing short of fraud could in the circumstances of that case have given a cause of action, for example that negligent misrepresentation could not do so.

This being so, the first question is whether the principle laid down in *Gould's* case (101) has been modified or overruled, either expressly or by necessary implication, by the decision in any other case of superior authority. It has been qualified by *Nocton* v. *Ashburton* (103) to this extent, that in the passage cited above, after the words "in the absence of contract with the plaintiff" the further words "or in the absence of some circumstances "connoting a fiduciary relationship between the defendant and the plaintiff", ought to be written in. Subject to this gloss has it been overruled? It has certainly not been overruled expressly. Has it then been overruled by necessary implication?

(99) (1889) 14 App. Cas. 337.
(100) (1888) 39 Ch. D. 39.
(101) [1893] 1 Q. B. 491.
(102) Ibid. 498.
(103) [1914] A. C. 932.

Lord Atkin in *Donoghue's* case (104) refers pointedly to *Gould's* case (105) in his speech, without a hint or a suggestion that it was wrongly decided, or that the memorable formula which he himself was announcing was inconsistent with it. As regards the two minority judgments, one of them, that of Lord Buckmaster, also mentions the case, and without disapproval.

On the other hand it is arguable (though the argument does not carry conviction to my mind) that, whether or not Lord Atkin realized the fact or directed his mind to the question, the formula which he laid down does in fact logically invalidate the principle laid down and acted on in *Gould's* case (105). This contention must be squarely faced. Lord Atkin pointed out that the law governing the duty owed by A to B in the absence of fraud, contract or fiduciary relationship has been built up piecemeal—built up, if one may pursue the metaphor, in disconnected slabs exhibiting no organic unity of structure. Certain classes owed duties of care to certain other classes: road users to other road users; bailees to persons entrusting property to them; doctors and surgeons (and originally barbers) to persons entrusting their bodies to them; occupiers of premises to persons whom they invite or permit to come on the premises; and so on. These categories attracting the duty had been added to and subtracted from from time to time. But no attempt had been made in the past to rationalize them; to find a common denominator between road users, bailees, surgeons, occupiers, and so on, which would explain why they should be bound to a duty of care and some other classes who might be expected equally to be so bound should be exempt—no attempt, that is, save that of Lord Esher, M.R. (from which his colleagues dissociated themselves) in *Heaven* v. *Pender* (106). Yet, says Lord Atkin, there must be such a common denominator, some general conception of relations present in the cases in which a duty arises, and absent in cases in which it does not.

Very tentatively (and prefacing his observation with a warning that it might go beyond the province of a judge to make such an attempt), he suggested the formula which has now become classic but which nevertheless it is desirable here to quote afresh (107): "You must take reasonable care to avoid acts or omissions which "you can reasonably foresee would be likely to injure your neigh- "bour. Who, then, in law, is my neighbour? The answer seems

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(104) [1932] A. C. 562.

(105) [1893] 1 Q. B. 491.

(106) (1882) 9 Q. B. D. 302; (1883) 11 Q. B. D. 503.

(107) [1932] A. C. 562, 580–1.

"to be—persons who are so closely and directly affected by my "act that I ought reasonably to have them in contemplation as "being so affected when I am directing my mind to the acts or "omissions which are called in question. This appears to me to "be the doctrine of *Heaven* v. *Pender* (106), as laid down by "Lord Esher (then Brett, M.R.), when it is limited by the notion "of proximity introduced by Lord Esher himself and A. L. "Smith, L.J., in *Le Lievre* v. *Gould* (108)".

This passage, if read literally and without regard to the qualifying effect of its context or of the "subjecta materies", might be taken to comprehend not only conduct causing physical injury to person or property through setting a certain kind of chattel in motion or in circulation (the case immediately under review); but also conduct of any kind, through any means (including negligent misstatement) causing damnum of any kind recognized by the law, whether physical or not, to anyone who could bring himself within Lord Atkin's definition of a "neighbour". I cannot believe so broad an application was intended by Lord Atkin himself. The case may not decide quite so little as is contained in its somewhat conservative headnote, which purports to confine it to the act of a manufacturer launching into circulation a negligently manufactured chattel which is calculated to injure and in fact injures the ultimate consumer or user in circumstances in which neither he nor any intermediate party has a reasonable opportunity of examining it. In fact it has since been applied somewhat outside this limited ambit; for instance, to physical injury caused by negligent failure to repair a lift (*Haseldine* v. *C. A. Daw & Son Ld.* (109)), and a motor car (*Denny* v. *Supplies and Transport Co. Ld.* (110)), or by the negligent adoption of a system of working. It has, however, I think, never been applied where the damage complained of was not physical. Wrottesley, J., in *Old Gate Estates Ld.* v. *Toplis* (111) held its application was limited to cases where the injury was to life or limb. I think this is too narrow a view and that physical injury to property may suffice, but it has never been applied to injury other than physical.

Apart, however, from any limitation which should be read into Lord Atkin's language by reference to the facts of the case before him—the "subjecta materies"—it seems to me incredible that if he thought his formula was inconsistent with *Gould's* case (112) he would not have said so. This case, now nearly sixty years old, had at that time stood for nearly forty years. He must have considered it closely. Yet his only reference to it is as annexing a valid and essential qualification to Lord Esher's formula in *Heaven* v. *Pender* (113). Not a word of disapproval of the decision on its merits. The inference seems to me to be that Lord Atkin continued to accept the distinction between liability in tort for careless (but non-fraudulent) misstatements and liability in tort for some other forms of carelessness, and that his formula defining "who is my neighbour" must be read subject to his acceptance of this overriding distinction.

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(108) [1893] 1 Q. B. 491.
(109) [1941] 2 K. B. 343.
(110) [1950] 2 K. B. 374.
(111) 161 L. T. 227.
(112) [1893] 1 Q. B. 491.

Counsel for the plaintiff was unable to point to any clear decided case, standing unreversed, either before or after *Donoghue's* case (114), in which (always apart from fraud, contract and fiduciary relationship) A had ever been held liable to B in damages for a careless misrepresentation. But he anchored certain hopes on *George* v. *Skivington* (115), and on certain observations of Lord Herschell in *Derry* v. *Peek* (116). I will say a word now on each of these cases.

George v. *Skivington* (115), after a long and rough crossing, has limped into port. It was in the end vindicated by the House of Lords in *Donoghue's* case (114). The case was tried on demurrer.

The declaration averred "that the defendant carried on the "business of a chemist, and in the course of such business "professed to sell a chemical compound made of ingredients "known only to the defendant, and which he represented and "professed to be fit and proper to be used for washing the hair, "which could and might be so used without personal injury to "the person using the same, and to have been carefully and "skilfully and properly compounded by him, the defendant, and, "thereupon, the plaintiff Joseph George, bought of the defendant, "and the defendant sold to him at a certain price, a bottle of "the said compound, to be used by the plaintiff Emma for "washing her hair, as the defendant then knew, and on the terms "that the same was fit and proper to be used, and could be "safely used, by her for the purpose aforesaid, without personal "injury to her, and had been skilfully, carefully, and properly "compounded by the defendant, and that the wife suffered "consequent injury".

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(113) 11 Q. B. D. 503.
(114) [1932] A. C. 562.
(115) L. R. 5 Ex. 1.
(116) 14 App. Cas. 337.

Thus it was averred that the defendant put into circulation, knowing it was intended to be used by the purchaser's wife, a negligently compounded and deleterious hairwash. She used it, sustained physical injury, and an action was brought by her or on her behalf, in which she succeeded on the issue raised by the demurrer. So far, the case is on all fours with *Donoghue's* case (114) according to its narrowest interpretation, and it is not surprising that *Donoghue's* case (114) affirmed it. But the declaration also averred that the defendant had said the hairwash was safe.

The present plaintiff basing himself on this last averment contended that it—an averment of negligent misstatement—standing alone, would have evoked the same decision, namely, that the facts averred amounted, if proved, to a good cause of action. This I venture to doubt. It seems to me that the essence of the decision resided in the averment of negligent compounding and setting in motion by the defendant of a physical thing with knowledge that the plaintiff would or might use the physical thing so compounded and with resulting injury to the plaintiff: and that the parallel between the snail case and the hairwash case lay exclusively in these features.

Among decided cases, *Derry* v. *Peek* (117), it is said, lends indirect support to the plaintiff's case. This contention is based on a dictum of Lord Herschell's (118), who in deciding that the defendants were not liable for a non-fraudulent misrepresentation in their prospectus, said that he excluded from his purview cases "where a person, within whose special province it lay to know a "particular fact, has given an erroneous answer to an inquiry "made with regard to it by a person desirous of ascertaining the "fact for the purpose of determining his course".

Here again is a statement which if construed in its literal breadth might seem to fit the present case. Lord Herschell's dictum was, however, later interpreted both by the Court of Appeal in *Low* v. *Bouverie* (119), and later by the House of Lords in *Nocton* v. *Ashburton* (120). It seems clear from the latter case (in which the former was also considered and affirmed) that Lord Herschell's proposition was held only to hold good where (to use its terms) the "person within whose special "province it lay to know a particular fact" occupied a contractual or fiduciary position vis-à-vis the "person desirous of

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(117) 14 App. Cas. 337.
(118) Ibid. 360.
(119) [1891] 3 Ch. 82.
(120) [1914] A. C. 932, 950.

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"ascertaining that fact". The cases which had decided otherwise are one by one dismissed by Lord Haldane as defensible if at all only on some other ground: warranty, estoppel, or whatnot. He affirms that liability for negligence in word has in material respects developed in our law differently from liability for negligence in act. The cases which are cited in support of Lord Herschell's dictum are all based, according to Lord Dunedin (121), "on the existence of a fiduciary relationship, and subsequently "the breach of duty arising".

In what has gone before it has been assumed that the two Law Lords who agreed with Lord Atkin's opinion or result accepted the broad formula about "my duty to my neighbour" which he laid down, as well as in the narrow proposition limited to the liability of the negligent manufacturer of a chattel which reaches the consumer, without an opportunity of intermediate examination, and injures him. This assumption seems to me more than questionable. Lord Thankerton, though he says (122) that he entirely agreed with Lord Atkin's discussion of the authorities, is clearly considering the authorities in their application to the narrow ambit of a manufacturer's liability, chattels and physical injury. His judgment does not travel outside these limits. Nor do I read Lord Macmillan's judgment as indorsing the wider proposition. There is a passage in which he lays down certain general propositions (123). It would have been easy for him to have adopted Lord Atkin's formula in terms if he had thought so broad a proposition justified. But when he says in an oft-quoted phrase, "the categories of negligence are never "closed" he is not, in my view, accepting an acid test of liability valid in all circumstances—he does not mention the word "neighbour"; he is merely saying that in accordance with changing social needs and standards new classes of persons legally bound or entitled to the exercise of care may from time to time emerge —in this case by the addition of a careless manufacturer or circulator of a chattel—as parties bound, vis-à-vis consumers, or users, as parties entitled. In other words, what Lord Macmillan envisaged was the addition of another slab to the existing edifice, not a systematic reconstruction of the edifice on a single logical plan.

(121) [1914] A. C. 932, 964.
(122) [1932] A. C. 562, 604.
(123) [1932] A. C. 562, 619.

For these reasons I am of opinion that *Donoghue's* case (125) neither reverses nor qualifies the principle laid down in *Gould's* case (124).

If, contrary to my view, Lord Atkin's broad principle was affirmed by a majority of the House of Lords, it has been argued that *Gould's* case (124) did not attract the operation of that principle, because upon its facts the degree of "proximity" involved was insufficient to do so, but that the present case does attract it, because, on its facts, the requisite degree of "proximity" *is* established. If this were so, it would be possible to reconcile (a) the validity and authoritative character of Lord Atkin's formula with (b) the validity of *Gould's* case (124) on its own facts and (c) a decision in favour of the plaintiff on the facts of the present case. The contention under this head is, in other words, firstly, that *Donoghue's* case (125) overrules *Gould's* (124) so far as the latter places careless misstatements on a different and privileged level as compared with some other forms of careless behaviour, but, secondly, that the actual result of *Gould's* case (124) was right because the *Donoghue* principle required "proximity" as a condition of liability and there was in *Gould's* case (124) no sufficient "proximity" (a circumstance which accounts for Lord Atkin's omission to say that *Gould's* case (124) was wrongly decided), and that that result was consistent with a different result in the present case.

This argument also seems to me invalid. The only difference, quoad "proximity", between the present case and *Gould's* (124) is that in the present case Fraser knew, when he made his representation, the identity of the man who was likely to rely on his representations, whereas Gould did not know this: he did not know that the parties who were to make the advances were the mortgagees, the plaintiffs, or at least he did not know the contents of the mortgage deed. But consider what he did know. He knew before any mortgage was effected that his certificates were required because advances were going to be made by someone to the builder on the security of the work performed up to date as vouched by his certificates. That someone could only be the building owner or some other lender relying on the same security.

I take the following passage from the statement of facts (126), premising that Hunt was the owner of the land on which two houses were to be built; Lovering was the builder; Dennes was the mortgagee who ultimately made advances; and Le Lievre, the plaintiff, was Dennes' assign. "Hunt arranged with the plaintiff "Dennes that he should advance the 850*l.* to Lovering" (the builder) "upon the security of a mortgage from him. Hunt also "agreed with the defendant Gould, who was an architect and "surveyor at Ilfracombe, that he should give certificates from "time to time that the work had reached the respective stages "at which the respective instalments were to be advanced as "provided by the schedule of advances, a copy of which was "given to the defendant. This agreement with the defendant "was made before the execution of the mortgage."

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(124) [1893] 1 Q. B. 491.
(125) [1932] A. C. 562.
(126) [1893] 1 Q. B. 491, 492.

On those facts, to say there was insufficient proximity in the *Gould* case (124) seems to me wrong. Lord Atkin, in affirming the *Donoghue* type of liability, and annexing to it the condition of proximity, did not say: "There is no proximity unless the "defendant can identify the ultimate victim of his carelessness "in advance". The manufacturers of the peccant bottle of ginger beer had no idea who would in the end consume it. All they knew was that someone would. You may adapt the formula "Certum est quod certum reddi potest" and say "certus "est qui certus reddi potest". The unidentifiability in advance of the ultimate consumer and victim did not, by displacing the notion of proximity or in any other way, protect the aggressors from liability. I am therefore of opinion that this argument fails.

Singular consequences would follow if the principle laid down in the snail case (127) were applied to negligent misrepresentation in every case in which the representee were proximate to the representor. The case has been instanced by Professor Winfield and referred to by my brother Denning of a marine hydrographer who carelessly omits to indicate on his map the existence of a reef. The captain of the "Queen Mary", in reliance on the map and having no opportunity of checking it by reference to any other map, steers her on the unsuspected rocks, and she becomes a total loss. Is the unfortunate cartographer to be liable to her owners in negligence for some millions of pounds damages? If so, people will, in future, think twice before making maps. Cartography would become an ultra-hazardous occupation. Yet what line can be drawn between the map-maker and the defendants in the present case. If it be said that there is no proximity between the cartographer and those for whose use his map

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(124) [1893] 1. Q. B. 491.

(127) [1932] A. C. 562.

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is designed, the reply surely is that there is just as much "proximity" as there was between the manufacturer of the peccant ginger beer bottle and its ultimate consumer.

In the present state of our law different rules still seem to apply to the negligent misstatement on the one hand and to the negligent circulation or repair of chattels on the other; and *Donoghue's* case (127) does not seem to me to have abolished these differences. I am not concerned with defending the existing state of the law or contending that it is strictly logical—it clearly is not. I am merely recording what I think it is.

If this relegates me to the company of "timorous souls", I must face that consequence with such fortitude as I can command. I am of opinion that the appeal should be dismissed.

COHEN, L.J. The trial judge dismissed the plaintiff's claim. He found "no fraud" and from this part of his judgment the plaintiff does not appeal. He also found that the only duty which the defendants owed to the plaintiff was to produce accounts which they honestly believed to be the draft accounts of the company. In other words he found that they owed no duty of care to the plaintiff. From that part of his judgment the plaintiff appeals on two grounds.

He says first that, since to the knowledge of the defendants' employee, Mr. Fraser, the plaintiff was a prospective investor in the company and was asking for information about the accounts of the company to assist him in reaching a decision whether to make the investment, the defendants, in accordance with the principles laid down by Lord Atkin in *Donoghue* v. *Stevenson* (128), owed a duty to the plaintiff, when giving him that information, to exercise care to see that it was accurate. Secondly, he says that since the information given to the plaintiff was inaccurate in material particulars owing to the negligence of the defendants' employee Fraser, the defendants are liable in damages. Alternatively, the plaintiff alleges that, as he became a shareholder in the company, and the defendants were the auditors of the company, they owed a duty to him as shareholder to give him the accurate information which they should have given him when he was a prospective investor. This duty, he says, was broken and accordingly he is entitled to damages.

So far as the second ground is concerned, I entirely agree with the judge that no damage flowed from the breach of such duty as is owed by the defendants as auditors to the plaintiff as a shareholder. The 2,000*l.* had been irretrievably invested before the relationship had become operative. I would add that I doubt whether the defendants' alleged duty as auditors extends to cover information given to the plaintiff before he became a shareholder. The first ground presents more difficulty, but despite Mr. Lawson's able and lucid argument, I have come to the conclusion that we are bound by authority to hold that the judge came to the right conclusion.

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(127) [1932] A. C. 562.

(128) Ibid. 580–1.

Mr. Foster submitted first that Fraser was not acting within the scope of his employment in giving to the plaintiff information as to the accounts and that therefore the defendants could not be liable for his negligence in the preparation thereof. So far as this point is concerned, I have nothing to add to the reasons given by my brethren for thinking that it cannot be sustained. Secondly, he said that the principle of *Donoghue* v. *Stevenson* (128) had never been applied to a case of negligent misstatement. A defendant could only be liable for negligent misstatement where there was a contractual nexus or a fiduciary relationship between him and the plaintiff. In the absence of such a relationship the decision in *Derry* v. *Peek* (129), as interpreted in *Nocton* v. *Ashburton* (130) is, says Mr. Foster, authority that no liability in negligence exists. This argument is, I think, well-founded.

In *Donoghue* v. *Stevenson* (128), as in all the other cases to which our attention was called, the breach of duty alleged has been one which has resulted in damages to the person of the plaintiff: see *Haseldine* v. *C. A. Daw & Son Ld.* (131), *Denny* v. *Supplies & Transport Co. Ld.* (132). In *Old Gate Estates Ld.* v. *Toplis* (133) Wrottesley, J., refused to apply the principle of *Donoghue* v. *Stevenson* (128) to a case where a company had paid too much for a property owing to an over-valuation by the defendants, who had been instructed by the promoters to value it for the purpose of the promotion.

The company, which was the plaintiff, was not formed at the time of the valuation. Wrottesley, J., rejecting an argument based on *Donoghue* v. *Stevenson* (128) said (134): "The conception "which runs through all these cases, both in those applications of "the principle and in the case of *Donoghue* v. *Stevenson* (128) "itself, is that something was negligently created or put into

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(128) [1932] A. C. 562.
(129) (1889) 14 App. Cas. 337.
(130) [1914] A. C. 932.
(131) [1941] 2 K. B. 343.
(132) [1950] 2 K. B. 374.
(133) 161 L. T. 227.
(134) Ibid. 229.

" circulation which was dangerous either to life or limb "—those are, I think, the very words of Lord Atkin himself and the other learned Lords who delivered opinions, or the opinions of the majority, in *Donoghue* v. *Stevenson* (128)—" or else that some- " thing was carelessly handled, made, or mended, which would " become dangerous to life or limb or health. It is as true " today as it was in 1893, when *Le Lievre* v. *Gould* (135) was " decided, that, to use the words of Bowen, L.J. (136): ' It is " ' idle to refer to cases which were decided under totally different " ' aspects, and upon totally different considerations of the law. " ' Take, for example, the case of an owner of a chattel, such as " ' a horse, gun, or a carriage, or any other instrument, which is " ' in itself of such a character that, if it be used carelessly, it " ' may injure some third person who is near to it; then it is as " ' plain as daylight that the owner of that chattel, who is respon- " ' sible for its management, is bound to be careful how he uses " ' it. Exactly in the same way with regard to the owner of " ' premises. If the owner of premises knows that his premises " ' are in a dangerous condition, and that people are coming there " ' to work upon them by his own permission and invitation, of " ' course he must take reasonable care that those premises " ' do not injure those who are coming there. . . . How has it " ' any application to the present case? ' (that was the case of " a certificate given by an architect). " ' Only, I suppose, on " ' the suggestion that a man is responsible for what he states " ' in a certificate to any person to whom he may have reason " ' to suppose that the certificate may be shown. But the law " ' of England does not go to that extent; it does not consider " ' that what a man writes on paper is like a gun or other " ' dangerous instrument, and, unless he intended to deceive, the " ' law does not, in the absence of contract, hold him responsible " ' for drawing his certificate carelessly ' ".

I think that that is as true today as it was when it was said by Bowen, L.J. Wrottesley, J., continued: " There is, in my " opinion, nothing in *Donoghue* v. *Stevenson* (128) which makes " that bad law. The exceptions laid down by *Donoghue* v. " *Stevenson* (128) "—the exceptions to the rule that a man is obliged to be careful only to those to whom he owes a duty by contract—" are, as I understand the decision, confined to negli- " gence which results in danger to life, danger to limb, or danger

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(135) [1893] 1 Q. B. 491.

(136) Ibid. 502.

"to health, and, the present case not being one of those exceptions, the plaintiffs have, in my opinion, no cause of action on the analogy of that case".

Mr. Foster submitted that these observations constituted a correct statement of the law at any rate if the words "or property" were added after the words "or danger to health".

The question of liability for negligent misstatement was also considered by Devlin, J., in *Heskell* v. *Continental Express Ld.* (137), a case where through carelessness a bill of lading had been issued for goods which had not been shipped. Devlin, J., said (138): "In my judgment, therefore, the plaintiff has not established any contractual relationship with Strick giving rise to any particular duty owing to him. In putting forward the wider proposition that Strick owed a duty to the public not carelessly to circulate a document of title knowing it would be used as such, counsel for the plaintiff acknowledged the difficulty he encountered because of *Le Lievre* v. *Gould* (139), and other similar decisions which make it plain that negligent misstatement can never give rise to a cause of action". Read literally this statement is too wide, since negligent misstatement can give rise to a cause of action, not only where there is a contractual relationship, but also where there is a fiduciary relationship: see *Nocton* v. *Ashburton* (140); but with this limitation the statement is, in my opinion, correct.

So far as I am aware, there is only one reported case involving negligent misstatement which supports the plaintiff's claim. That is the decision of Chitty, J., in *Cann* v. *Willson* (141). In that case (I am reading from the headnote), "An intending mortgagor, at the request of the solicitors of an intending mortgagee, applied to a firm of valuers for a valuation of the property proposed to be mortgaged. A valuation at the sum of 3,000*l.* was sent in by the valuers direct to the mortgagee's solicitors, and the mortgage was subsequently carried out. Default having been made in payment by the mortgagor, and a loss having resulted to the mortgagee, he commenced an action against the valuers for damages for the loss sustained through their negligence, misrepresentation, and breach of duty. The court being satisfied on the evidence that the defendants knew at the time the valuation was made that it was for the purpose of an advance, and that the valuation as made was

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(137) [1950] 1 All E. R. 1033.
(138) Ibid. 1041.
(139) [1893] 1 Q. B. 491.
(140) [1914] A. C. 932.
(141) (1888) 39 Ch. D. 39.

" in fact no valuation at all:—*Held*, that, under the circum- " stances, the defendants were liable on two grounds: (1.) that " they (independently of contract) owed a duty to the plaintiff " which they had failed to discharge; (2.) that they had made " reckless statements on which the plaintiff had acted ".

If the first ground of decision was good law, it would support Mr. Lawson's argument; but the case was considered by this court in *Le Lievre* v. *Gould* (142), and Lord Esher, M.R., Bowen, L.J., and A. L. Smith, L.J., all agreed that *Cann* v. *Willson* (141) must be treated as overruled by *Derry* v. *Peek* (143). The facts in *Le Lievre* v. *Gould* (144) differed somewhat from those in the present case, but I do not think the court thought the differences material, for Lord Esher, M.R., stated the problem with which the court was then faced in the following terms (145): " Then it is said that, even if there was no contract " between the plaintiff Dennes and the defendant, nevertheless " the defendant is liable to the plaintiffs for having given certifi- " cates which contained untrue statements; for, it is said, the " defendant owed a duty to the plaintiffs to exercise care in " giving the certificates, because he knew that the plaintiffs " would or might act upon them by advancing money to " Lovering ".

Lord Esher, M.R., in *Le Lievre* v. *Gould* (144), proceeded to consider the problem. He treated *Heaven* v. *Pender* (146), which was the foundation of *Donoghue* v. *Stevenson* (147), as good law, saying (148): " If one man is near to another, or is near to the " property of another, a duty lies upon him not to do that which " may cause a personal injury to that other, or may injure his " property. For instance, if a man is driving along a road, it is " his duty not to do that which may injure another person whom " he meets on the road, or to his horse or his carriage ". He then considered *Cann* v. *Willson* (149), and said it was not good law, and finally came to the conclusion that the action failed, saying, in the last two or three lines of his judgment: " Such " negligence, in the absence of contract with the plaintiffs, can " give no right of action at law or in equity. All the grounds " urged on behalf of the plaintiffs fail, and the appeal must be " dismissed ".

(142) [1893] 1 Q. B. 491.
(143) 14 App. Cas. 337.
(144) [1893] 1 Q. B. 491.
(145) Ibid. 496.
(146) (1883) 11 Q. B. D. 503.
(147) [1932] A. C. 562.
(148) [1893] 1 Q. B. 491, 497.
(149) 39 Ch. D. 39.

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Bowen, L.J., and A. L. Smith, L.J., gave judgment to the same effect. I need not, I think, refer to any passages in their judgments because I have referred to the material passage in Bowen, L.J.'s judgment, where it was cited by Wrottesley, J., in *Old Gate Estates Ld.* v. *Toplis* (150).

The principle of that decision seems to me directly in point in the present case. It is binding on us unless it can be said to be inconsistent with some other decision of this court or of the House of Lords. I am unable to find any such decision. Mr. Lawson asked us to say that it is inconsistent with the principle laid down by Lord Atkin in *Donoghue* v. *Stevenson* (147). It is to be observed that in *Donoghue* v. *Stevenson* (147) Lord Atkin himself cited with approval some passages from the judgments of Lord Esher, M.R., and A. L. Smith, L.J., in *Le Lievre* v. *Gould* (151), and I am unable to believe that if he had thought the ratio decidendi in that case was wrong he would have cited those passages without making it clear that he was not approving the decision. I think, therefore, that although the relevant passages in Lord Atkin's speech (152) are couched in such general terms that they might possibly cover the case of negligent misstatement, that question was not present to Lord Atkin's mind or intended to be covered by his statement.

Mr. Lawson further submitted that *Derry* v. *Peek* (153) was purely a case of fraud and did not touch the question of negligent misstatement. It is true that the cause of action in *Derry* v. *Peek* (153) was one of fraud, but it is, I think, implicit in the speeches that their Lordships would have reached the same conclusion had there been an alternative plea of negligence. I am fortified in this conclusion by the observations of two of their Lordships in *Nocton* v. *Ashburton* (154). Lord Haldane, L.C., said (155): "My Lords, the discussion of the case by the noble "and learned Lords who took part in the decision appears to "me to exclude the hypothesis that they considered any other "question to be before them than what was the necessary foun"dation of an ordinary action for deceit". He is examining the decision in *Derry* v. *Peek* (153): "They must indeed be taken "to have thought that the facts proved as to the relationship of "the parties in *Derry* v. *Peek* (153) were not enough to establish

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(147) [1932] A. C. 562.
(150) 161 L. T. 227.
(151) [1893] 1 Q. B. 491.
(152) [1932] A. C. 562, 580–1.
(153) 14 App. Cas. 337.
(154) [1914] A. C. 932.
(155) Ibid. 947.

" any special duty arising out of that relationship other than the " general duty of honesty ".

Again, Lord Shaw cites with approval (156) a passage from the judgment of Bowen, L.J., in *Low* v. *Bouverie* (157), where Bowen, L.J., said: " '*Derry* v. *Peek* (153) decides . . . " ' that in cases such as those of which that case was an instance, " ' there is no duty enforceable at law to be careful in the repre-" ' sentation which is made. Negligent misrepresentation does " ' not certainly amount to deceit, and negligent misrepresenta-" ' tion can only amount to a cause of action if there exist a duty " ' to be careful—not to give information except after careful " ' inquiry. In *Derry* v. *Peek* (153) the House of Lords con-" ' sidered that the circumstances raised no such duty. It is " ' hardly necessary to point out that, if the duty is assumed to " ' exist, there must be a remedy for its non-performance, and " ' that therefore the doctrine that negligent misrepresentation " ' affords no cause of action is confined to cases in which there " ' is no duty, such as the law recognizes, to be careful ' ".

Derry v. *Peek* (153) was a case where the action was founded on a false statement in a prospectus, and I find it difficult to imagine a case where the proximity test laid down by Lord Atkin in *Donoghue* v. *Stevenson* (158) would more clearly be satisfied if the principle of that case is applicable to negligent misstatement. Mr. Lawson submitted that there was a distinction between *Derry* v. *Peek* (153) and the present case in that a prospectus is issued to the world at large, whereas Fraser's statements were addressed to the plaintiff in particular. This seems to me to be a distinction without a difference in principle.

For these reasons I think the decision in *Le Lievre* v. *Gould* (159) is still good law and is conclusive of the present case.

I might perhaps add that the conclusion I have reached appears to accord with the views of the textbook writers. The learned editor of Salmond on Torts expresses the view that with certain exceptions not material to the present case, " A false " statement is not actionable as a tort unless it is wilfully false. " Mere negligence in the making of false statements is not " actionable either as deceit or as any other kind of tort " (160). He regards the rule as anomalous.

Winfield (161) expresses his dislike of it in more forcible language, but he recognizes that decisions of this court are definitely against the existence of any action in tort for negligent statement. He thinks that it is open to the House of Lords to take the contrary view. On this point I need express no opinion.

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(156) Ibid. 971.
(157) [1891] 3 Ch. 82.
(158) [1932] A. C. 562.
(159) [1893] 1 Q. B. 491.
(160) 10th ed. at p. 580.
(161) 4th ed. at pp. 386, 387.

Before parting with the textbook writers I ought perhaps to mention that Dr. Charlesworth, in his book on the Law of Negligence (162), suggests an explanation of the alleged anomaly in the rule. He says: "The duty to take care is ultimately "based on the possible consequences which will occur if care is "not taken. What the consequences may be of any particular "act or omission is often a very difficult problem involving "inquiry into questions of causation. This inquiry is difficult "enough in cases where physical damage is concerned in which "the cause, whether it be defective vehicles or machinery or lack "of care and skill in management, can usually be accurately "traced. To regard the issue of a certificate, an opinion, or a "report as carrying the same duty of care as the delivery of a "defective chattel would be to introduce a most disturbing factor "into the mutual intercourse of society". I do not find this explanation entirely satisfactory, but I am unable to suggest a better one. Be that as it may, I am satisfied that on the authorities as they stand we have no alternative but to dismiss this appeal.

Since I wrote this judgment my attention has been directed by Professor Goodhart to a case in the New York Reports where a similar point was considered. The case is *Ultramares Corporation* v. *Touche* (163). It has the merit that the decision of the court was given by Cardozo, C.J. In that case the accountants had certified the annual report of a company which, in order to finance its operations, required extensive credit and borrowed large sums from banks and other lenders.

The facts are stated quite shortly and sufficiently for my present purpose (164): "In January, 1924, the defendants, a "firm of public accountants, were employed by Fred Stern & "Co. Inc. to prepare and certify a balance sheet exhibiting the "condition of its business as of December 31, 1923. They had "been employed at the end of each of the three years preceding "to render a like service. Fred Stern & Co., Inc., which was "in substance Stern himself, was engaged in the importation "and sale of rubber. To finance its operations, it required

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(162) 2nd ed. at p. 16.

(163) (1931) 255 N. Y. Rep. 170; 174 North Eastern Rep. 441.

(164) 255 N. Y. Rep. 173; 174 North Eastern Rep. 442.

" extensive credit and borrowed large sums of money from banks " and other lenders. All this was known to the defendants. The " defendants knew also that in the usual course of business the " balance sheet, when certified, would be exhibited by the Stern " company to banks, creditors, stockholders, purchasers or " sellers, according to the needs of the occasion, as the basis of " financial dealings. Accordingly, when the balance sheet was " made up, the defendants supplied the Stern company with " thirty-two copies certified with serial numbers as counterpart " originals. Nothing was said as to the persons to whom these " counterparts would be shown or the extent or number of the " transactions in which they would be used. In particular there " was no mention of the plaintiff, a corporation doing business " chiefly as a factor, which till then had never made advances " to the Stern company, though it had sold merchandise in small " amounts. The range of transactions in which a certificate of " audit might be expected to play a part was as indefinite and " wide as the possibilities of the business that was mirrored in " the summary ".

The court held that mere negligence did not make the defendants liable to the plaintiffs, who had made advances on the strength of the certified accounts, though they in fact found that there was evidence of negligence by the defendants in making their report.

Cardozo, C.J., said (165): " We are brought to the question " of duty, its origin and measure. The defendants owed to their " employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with " the care and caution proper to their calling. Fraud includes " the pretence of knowledge when knowledge there is none. To " creditors and investors to whom the employer exhibited the " certificate, the defendants owed a like duty to make it without " fraud, since there was notice in the circumstances of its making " that the employer did not intend to keep it to himself ". I pause there to say that there follows a citation, but I do not propose to burden this judgment with the citations of the learned judge except where they are of English cases.

" A different question develops when we ask whether they " owed a duty to these to make it without negligence. If liability " for negligence exists, a thoughtless slip or blunder, the failure " to detect a theft or forgery beneath the cover of deceptive

(165) 255 N. Y. Rep. 179; 174 North Eastern Rep. 444

"entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences. We put aside for the moment any statement in the certificate which involves the representation of a fact as true to the knowledge of the auditors. If such a statement was made, whether believed to be true or not, the defendants are liable for deceit in the event that it was false. The plaintiff does not need the invention of novel doctrine to help it out in such conditions. The case was submitted to the jury, and the verdict was returned upon the theory that, even in the absence of a misstatement of a fact, there is a liability also for erroneous opinion. The expression of an opinion is to be subject to a warranty implied by law. What, then, is the warranty, as yet unformulated, to be? Is it merely that the opinion is honestly conceived and that the preliminary inquiry has been honestly pursued, that a halt has not been made without a genuine belief that the search has been reasonably adequate to bring disclosure of the truth? Or does it go farther and involve the assumption of a liability for any blunder or inattention that could fairly be spoken of as negligence if the controversy were one between accountant and employer for breach of a contract to render services for pay?

"The assault upon the citadel of privity is proceeding in these days apace. How far the inroads shall extend is now a favourite subject of juridical discussion. . . .

"In the field of the law of contract there has been a gradual widening of the doctrine of *Laurence* v. *Fox* (166) . . . until today the beneficiary of a promise, clearly designated as such, is seldom left without a remedy. . . . Even in that field, however, the remedy is narrower where the beneficiaries of the promise are indeterminate or general. Something more must then appear than an intention that the promise shall redound to the benefit of the public or to that of a class of indefinite extension. The promise must be such as to 'bespeak the 'assumption of a duty to make reparation directly to the individual members of the public, if the benefit is lost'. . . . In the field of the law of torts a manufacturer who is negligent in the manufacture of a chattel in circumstances pointing to an

(166) 20 N. Y. Rep. 260.

"unreasonable risk of serious bodily harm to those using it "thereafter may be liable for negligence, though privity is lacking between manufacturer and user. . . . A force or instrument of harm having been launched with potentialities of "danger manifest to the eye of prudence, the one who launches "it is under a duty to keep it within bounds. . . . Even so, the "question is still open whether the potentialities of danger that "will charge with liability are confined to harm to the person, or "include injury to property. . . . In either view, however, what "is released or set in motion is a physical force. We are now "asked to say that a like liability attaches to the circulation of a "thought or a release of the explosive power resident in words".

The learned judge then considers three cases which were said to support the plaintiff's action, and continues (167): "From "the foregoing analysis the conclusion is, we think, inevitable "that nothing in our previous decisions commits us to a holding "of liability for negligence in the circumstances of the case at "hand, and that such liability, if recognized, will be an extension of the principle of those decisions to different conditions "even if more or less analogous. The question then is whether "such an extension shall be made.

"The extension, if made, will so expand the field of liability "for negligent speech as to make it nearly, if not quite, "coterminous with that of liability for fraud. Again and "again, in decisions of this court, the bounds of this latter "liability have been set up, with futility the fate of every "endeavour to dislodge them. Scienter has been declared "to be an indispensable element except where the representation has been put forward as true of one's own knowledge ". . . or in circumstances where the expression of opinion was a "dishonourable pretence. . . . Even an opinion, especially an "opinion by an expert, may be found to be fraudulent if the "grounds supporting it are so flimsy as to lead to the conclusion "that there was no genuine belief back of it. Farther than that "this court has never gone. Directors of corporations have been "acquitted of liability for deceit though they have been lax in "investigation and negligent in speech. . . . This has not "meant, to be sure, that negligence may not be evidence from "which a trier of the facts may draw an inference of fraud— "*Derry* v. *Peek* (168)—but merely that if that inference is "rejected, or, in the light of all the circumstances, is found to

(167) 255 N. Y. Rep. 185; 174 North Eastern Rep. 447.

(168) 14 App. Cas. 369, 375, 376.

"be unreasonable, negligence alone is not a substitute for "fraud.

"Many also are the cases that have distinguished between the "wilful or reckless representation essential to the maintenance "at law of an action for deceit, and the misrepresentation, negli-"gent or innocent, that will lay a sufficient basis for rescission "in equity. . . . If this action is well conceived, all these "principles and distinctions, so nicely wrought and formulated, "have been a waste of time and effort. They have even been a "snare, entrapping litigants and lawyers into an abandonment "of the true remedy lying ready to the call. The suitors thrown "out of court because they proved negligence, and nothing else, "in an action for deceit, might have ridden to triumphant victory "if they had proved the self-same facts, but had given the wrong "another label, and all this in a State where forms of action have "been abolished. So to hold is near to saying that we have been "paltering with justice. A word of caution or suggestion would "have set the erring suitor right. Many pages of opinion were "written by judges the most eminent, yet the word was never "spoken. We may not speak it now".

Then comes the final passage which I wish to read (169): "Liability for negligence if adjudged in this case will extend to "many callings other than an auditor's. Lawyers who certify "their opinion as to the validity of municipal or corporate bonds "with knowledge that the opinion will be brought to the notice "of the public, will become liable to the investors, if they have "overlooked a statute or a decision, to the same extent as if the "controversy were one between client and adviser. Title com-"panies insuring titles to a tract of land, with knowledge that "at an approaching auction the fact that they have insured will "be stated to the bidders, will become liable to purchasers who "may wish the benefit of a policy without payment of a premium.

"These illustrations may seem to be extreme, but they go "little, if any, farther than we are invited to go now. Negligence, "moreover, will have one standard when viewed in relation to "the employer, and another and at times a stricter standard "when viewed in relation to the public. Explanations that "might seem plausible, omissions that might be reasonable, if "the duty is confined to the employer, conducting a business "that presumably at least is not a fraud upon his creditors,

(169) 255 N. Y. Rep. 188; 174 North Eastern Rep. 448.

"might wear another aspect if an independent duty to be "suspicious even of one's principal is owing to investors. "'Everyone making a promise having the quality of a contract "'will be under a duty to the promisee by virtue of the promise, "'but under another duty, apart from contract, to an indefinite "'number of potential beneficiaries when performance has "'begun. The assumption of one relation will mean the "'involuntary assumption of a series of new relations, inescap"'ably hooked together'. . . . 'The law does not spread its "'protection so far'. . . .

"Our holding does not emancipate accountants from the "consequences of fraud. It does not relieve them if their "audit has been so negligent as to justify a finding that "they had no genuine belief in its adequacy, for this again "is fraud. It does no more than say that if less than this "is proved, if there has been neither reckless misstatement "nor insincere profession of an opinion, but only honest blunder, "the ensuing liability for negligence is one that is bounded by "the contract, and is to be enforced between the parties by whom "the contract has been made. We doubt whether the average "business man receiving a certificate without paying for it and "receiving it merely as one among a multitude of possible "investors, would look for anything more".

I am glad, therefore, to find that the conclusion which I have reached on the basis of the English authorities seems to accord with the opinion of so eminent a master of the common law as Cardozo, C.J.

I would only add that despite the observations of my brother Denning, I do not think the conclusion I have reached will encourage accountants to fall short of the high standard of conduct which the Institutes to which they belong have laid down for their members.

In the result this appeal will be dismissed.

Appeal dismissed.

Solicitors: *Edwin Coe and Calder Woods; Ashurst, Morris, Crisp & Co.*

C. G. M.

1950
Dec. 1.

Barry, J.

PRATT *v.* RICHARDS AND OTHERS.

[1950 P. 45.]

Factories and workshops—Building operation—Scaffolding—Breach of regulations—Fall of workman—Liability of erectors of scaffolding—Liability of employers—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I. No.* 1145), *regs.* 4, 5, 24.

Certain builders (the second defendants in the action), who were engaged on erecting some houses to which the Building (Safety, Health and Welfare) Regulations, 1948, applied, engaged contractors (the third defendants) to tile the roofs; the contract between them provided that the builders were to supply the battens and felts and to erect and maintain the necessary scaffolding. The contractors in their turn engaged sub-contractors (the first defendants) to do the work of tiling. The necessary scaffolding was erected by the builders at some unascertained date before October 1, 1948, and the platform from which the workmen reached the roof had no guard rail and was 15 ft. 2 ins. from the ground. The plaintiff was employed by the first defendants, and when in the course of his duty he was climbing down from the roof to this platform, he fell to the ground owing to the absence of a guard rail and was killed.

In an action by his widow claiming damages from the builders, the contractors and the sub-contractors under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934:—

Held, (1.) that the builders were contractors and employers of workmen within the meaning of reg. 4 of the Building Regulations, 1948, and were required to comply with regs. 5 and 24 (1.) for the benefit not only of their own employees but of all workmen engaged upon the construction of the houses; and that that duty extended to cases where the scaffold had been erected before October 1, 1948, on which date the present regulations came into force: the words in reg. 4 " who erects . . . any scaffold " meaning " who is the erector " of ".

Held, further, that the builders were under a duty to the deceased at common law to use reasonable skill and care in the erection of the scaffolding and had failed to perform that duty: *Heaven* v. *Pender* (1883) 11 Q. B. D. 503, as explained in *Donoghue* v. *Stevenson* [1932] A. C. 562, and *Horton* v. *London Graving Dock Co. Ld.* [1950] 1 K. B. 421 applied.

(2.) that although the third defendants were under a duty to the deceased to comply with reg. 31, the accident was not due to any breach of that regulation, and as the third defendants were neither the erectors of the scaffold nor employers of the deceased, they were not in breach of any duty to him at common law.

ACTION.

On January 19, 1949, Egerton Sidney Pratt, who was then employed as a tiler's labourer by the first defendant, J. N

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Richards, met with an accident at his work which caused his death. He was engaged on tiling the roofs of a block of four houses at Norwich, which were being built by the second defendants, H. C. Greengrass & Sons Ld. These builders had sub-contracted the tiling of the houses to the third defendants, Marley Tile Co. Ld., who had in their turn sub-contracted the whole work of laying the tiles and fixing the battens and felts to the first defendant. Under the contract between the builders and the third defendants the battens and felts were to be supplied and the scaffolding erected and maintained by the builders.

On the morning of the accident the necessary scaffolding had long since been erected by the builders, and the platform from which the tilers reached the roof had no hand rail and was 15 ft. 2 ins. from the ground, and 3 ft. below the overhanging eaves. In climbing from the roof to this platform, Pratt slipped and fell backwards to the ground.

His widow, the plaintiff, claimed damages from the three defendants on her own behalf and as administratrix of his estate under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. The first defendant did not contest his liability; the second and third defendants denied that they were guilty of any breach of common law or statutory duty, and pleaded contributory negligence. The second defendant alleged alternatively that the accident was attributable to the negligence or breach of duty of the first or third defendants or both of them.

J. B. Elton for the plaintiff.

The first defendant was not represented.

F. Whitworth for the second defendants, the builders.

Stephen Chapman for the third defendants.

Cur. adv. vult.

December 1, 1950. BARRY, J., reading his judgment, stated the facts as set out above, reviewed the evidence, and continued: I am satisfied that the deceased's loss of balance, whatever its cause, would have had no serious consequences but for the absence of a guard rail; and I am forced to the conclusion that had there been a guard rail to the platform the accident would not have taken place. The defendants have failed to establish contributory negligence on the part of the deceased as his fall was the very type of occurrence which the provision of a guard rail was designed to prevent.

It remains to examine the legal responsibility, if any, of the three defendants. The construction of this block of four houses was an operation to which the Building (Safety, Health and Welfare) Regulations, 1948, which came into force on October 1, 1948, applied (1). [His Lordship read regs. 4, 5, 24, 28 (1) and 31 (1), and continued:] The first defendant was, in my judgment, a "contractor or employer of workmen" within the meaning of reg. 4, and was thus obliged to comply with regs. 5, 24 (1) and 28 (1) in so far as they affected any workmen, such as the deceased, employed by him. He was further required to comply with reg. 31 (1). The platform from which the deceased fell was undoubtedly part of a "scaffold" within the meaning of reg. 5, and was also a "working platform or working place" within regs. 24 (1) and 28 (1). I find that the first defendant was in breach of each of these regulations and that the accident to the deceased resulted from a breach of regs. 5 and 24 (1). I have already indicated that I am not satisfied that the deceased in fact stood upon a loose batten and in these circumstances I cannot say that the breach of reg. 28 (1) was proved to be a contributory cause of the accident.

(1) By reg. 4 of the Building (Safety, Health and Welfare) Regulations, 1948: "It shall be the duty "of every contractor and employer of "workmen who is undertaking any "of the operations to which these "regulations apply (i) to comply with "such of the requirements of regs. "5 to 30, . . . as affect any workman "employed by him . . . ; (ii) to "comply with such of the require-"ments of regs. 31 to 33, 74 (1) . . . "as relate to any work, act or opera-"tion performed or about to be per-"formed by such contractor or "employer of workmen; and it shall "be the duty of every contractor and "employer of workmen who erects "or alters any scaffold to comply "with such of the requirements of "regs. 5 to 30 as relate to the erection "or alteration of scaffolds having "regard to the purpose or purposes "for which the scaffold is designed at "the time of the erection or altera-"tion".

By reg. 5: "Suitable and sufficient "scaffolds shall be provided for all "work that cannot safely be done on "or from the ground or from part of "the building, or from part of a per-"manent structure or from a ladder "or other available means of support, "and sufficient safe means of access "shall so far as is reasonably prac-"ticable be provided to every place at "which any person has at any time "to work".

Reg. 24 requires that subject to paras. 3, 4 and 5 of the regs., every side of a working platform or working place, being a side from which a person is liable to fall a distance of more than 6ft. 6ins., shall be provided with a suitable guard rail or guard rails.

Reg. 28 relates to the maintenance of platforms and gangways.

By reg. 31 (1): "Where work is "done on the sloping surface of a "roof and, taking into account the "pitch, the nature of the surface, and "the state of the weather, a person "employed is likely to slip down or "off the roof, then unless he has "adequate hand hold or foot hold or "is not liable to fall a distance of "more than 6ft. 6ins. from the edge "of the roof, suitable precautions "shall be taken to prevent his so "falling".

At common law the first defendant was under a duty to take reasonable care to provide proper plant, appliances and equipment for the use of his workmen. His failure to ensure that the platform of this scaffold was provided with a guard rail, as was required by the regulations, constituted a neglect of this duty, not because the regulation itself was broken, but because, as I find, a platform without a guard rail was not, and the defendant should have realized that it was not, a reasonably safe piece of plant or equipment for the particular work upon which the deceased was engaged. The duty to which I have referred is one which is personal to the employer; and the first defendant cannot escape from liability for its breach by showing that the scaffolding was in fact erected and maintained by someone other than himself. So far as his own workmen were concerned it was incumbent upon him to take reasonable steps to provide for their safety and the responsibility for his failure to do so must rest primarily on him.

The second defendants, as the principal contractors, were also "contractors or employers of workmen" within the meaning of reg. 4. They admittedly erected the scaffold for this block of houses, and it is plain from the evidence that the scaffold was designed at the time of its erection, and continued to be so designed, for the purpose of completing the four houses including the tiling of their roofs by sub-contractors and their workmen. Thus prima facie they were required to comply with regs. 5 and 24 (1) for the benefit not only of their own employees, but of all workmen engaged upon the construction of the houses.

Mr. Whitworth, however, contended that the obligations imposed by these regulations only applied to the scaffolding at the time of its erection or alteration and was not a continuing obligation. He pointed out that the second defendants began work on the houses in August, 1948, and that the plaintiff had failed to establish that the scaffolding for the four houses in question had been *erected* or *altered* after October 1 of that year when these regulations came into force. His argument was that if the scaffold was erected before that date the second defendants, as the law then stood, were under no legal duty imposed by statutory regulation to provide a hand rail for the benefit of workmen employed by their sub-contractors. He further said that on the true construction of reg. 4 the subsequent operation of the Regulations of 1948 did not impose that duty on them for so long as the previously erected scaffold remained unaltered. I am unable to accept this argument. It is true that the plaintiff must prove that the defendants were subject to regs. 5 and 24 (1) in so far as this scaffold was concerned, and there was no evidence to establish with any certainty the exact date on which the scaffold had been erected. Its erection had clearly taken place some considerable time before the accident, because on January 19, 1949, the main contractors' work on the four houses had been completed some three weeks before that date. When I use the word "completed" I do not intend to infer that they had no further work to do, but such other work as was required would have been done after the roofs had been tiled. I do not think that the words "who erects" in the second paragraph of reg. 4 bears the limited meaning suggested by Mr. Whitworth. In its context I consider that the true meaning of these words is "who is the erector", and that the regulation imposes a duty on every contractor or employer of labour who has erected or altered a scaffolding to comply with regs. 5 to 30 as from the date when the Regulations of 1948 came into force, and this duty extends to cases where the scaffold had been erected or altered before that date. The obligations imposed by these regulations are, of course, confined to such of their requirements as relate to the erection of a scaffold having regard to the purpose or purposes for which it was designed at the time of its erection. In the present case the scaffold was plainly being used for that purpose. If it had been used for other purposes the regulations might not have applied.

Before the decision of the Court of Appeal in *Horton* v. *London Graving Dock Co. Ld.* (2), it might have been possible for the second defendants to argue that the absence of a guard rail was not an unusual danger from the point of view of the deceased workman and that in consequence the plaintiff could establish no breach of duty on their part to the deceased who was not in their employment but in the employment of their sub-contractors. I do not think that any such defence is now open to these defendants. They were the erectors and the occupiers of the scaffolding, and the relationship between them and the deceased workman was that of invitor and invitee. Moreover, as erectors and suppliers of the scaffolding which was to be used by sub-contractors and their workmen, it seems to me that they fall within the principle enunciated by Brett, M.R., in *Heaven* v. *Pender* (3), as modified and explained by the subsequent cases referred to by Singleton, L.J., in his judgment in *Horton* v.

(2) [1950] 1 K. B. 421.

(3) (1883) 11 Q. B. D. 503, 509.

London Graving Dock Co. Ld. (4), when he said: "The defen-"dants were the main contractors, and they were fully aware of "the purposes for which they erected the staging and, in "particular, that it was to be used by sub-contractors' workmen. "Applying the words of Brett, M.R., in *Heaven* v. *Pender* (3), "as explained and modified by himself in *Le Lievre* v. *Gould* (5) "and by Lord Atkin in *Donoghue* v. *Stevenson* (6), I consider "that the defendants were under a duty towards the plaintiff to "use ordinary care and skill in the erection of the staging, and "that they failed in the performance of that duty. The defen-"dants owed to their own workmen a duty to use due care and "skill to provide proper plant and appliances. If an accident "had occurred to one of their own men through this defective "staging, it seems to me that, apart from questions such as "contributory negligence, they would have been responsible in "damages, and I fail to see why the position should be different "in the case of sub-contractors' men, for whose use, also, the "staging was erected by the defendants. In truth there would "not appear to be a great deal of difference between this aspect "of the case and that of invitor and invitee, if the view which "I have expressed of the rule in *Indermaur* v. *Dames* (7) is "correct. In *Addie (Robert) & Sons (Collieries) Ld.* v. *Dum-"breck* (8), Lord Hailsham, L.C., said of invitees: 'Towards "'such persons the occupier has the duty of taking reasonable "'care that the premises are safe'. That was a shorter way of "expressing the law, and it omitted that part of the words of "Willes, J., which indicates what may provide a defence when "there is evidence of neglect on the part of the occupier".

It follows, I think, from this statement of the law that, in circumstances such as these, the duties of the head contractor to persons employed by his sub-contractor are co-extensive with the duties owed by him to his own workmen. If, as I have held, the first defendant failed to take reasonable care to provide safe plant, appliances and equipment for the use of the deceased it must follow that the second defendants failed to perform the similar duty which they owed to him. In consequence I find that the second defendants are liable to the plaintiff at common law in addition to their liability to her under the Building (Safety Health and Welfare) Regulations, 1948.

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(4) [1950] 1 K. B. 421, 431.
(5) [1893] 1 Q. B. 491.
(6) [1932] A. C. 562, 580.
(7) L. R. 1 C. P. 274.
(8) [1929] A. C. 358.

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As to the third defendants, I am unable to accede to Mr. Stephen Chapman's submission that they were neither "contractors" nor "employers of workmen" within the meaning of reg. 4. In my judgment they were certainly "contractors", and, as such, were subject to the provisions of reg. 31 (1). This regulation, however, refers to the precautions which must be taken to protect workmen who are engaged in work upon the sloping surface of a roof so as to prevent them from slipping down or off the roof. The regulation is not, I think, designed to protect a workman who has safely negotiated the sloping surface, but is injured by falling or slipping from a working platform below the roof when he is lowering himself from the eaves to the floor of that platform. Indeed, if this working platform had been properly constructed a workman who slipped down or off this roof would not have been liable to fall more than 6 ft. 6 ins., and for this reason also I think that the regulation is wholly inapplicable to the facts of this accident.

Under the contract between the third and second defendants, the second defendants were required to provide and fix the necessary ladder, scaffolding, etc., at their own expense. The third defendants had no part in the design or erection of the scaffolding, which remained throughout in the occupation and control of the second defendants. Had the deceased workman been directly employed by the third defendants these facts would not, of course, have enabled them to escape liability, but, in the absence of any relationship of master and servant, I feel bound to find that the plaintiff has failed to establish any common law duty owed by these defendants to her late husband. They were neither the suppliers *nor* the occupiers of the scaffolding and they cannot, in my judgment, be brought within either of the well-known principles enunciated in *Heaven* v. *Pender* (9) or *Indermaur* v. *Dames* (10). I find that the claim against the third defendants fails.

The plaintiff is thus entitled to recover damages from the first and second defendants.

[His Lordship proceeded to assess the damages and gave judgment for the amount so assessed against the first and second defendants, and judgment for the third defendants against the plaintiff with costs, and ordered the second defendants to pay those costs direct to the third defendants.]

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(9) (1883) 11 Q. B. D. 503.

(10) L. R. 1 C. P. 274.

Judgment accordingly.

Solicitors: *Stephenson, Harwood & Tatham; Masons; L. Bingham & Co.*

S. C.

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Distinguished. DEAN v. BRUCE [1952] 1 K.B. 11

[1950 C. 3344]

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Asquith, Denning and Birkett, L.JJ.

Divorce—Promise by husband in 1943 *to pay wife* 100*l. a year free of income tax—Promise made after decree nisi but before decree absolute—Wife's forbearance to apply to Divorce Court for maintenance—No request, express or implied, by husband for forbearance—Action in* 1950 *in King's Bench Division by wife on husband's promise—Absence of consideration.*

The principle stated in *Central London Property Trust Ld.* v. *High Trees House Ld.* [1947] K. B. 130 and *Robertson* v. *Minister of Pensions* [1949] 1 K. B. 227, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

But this principle does not create any new cause of action where none existed before; so that, where a promise is made which is not supported by any consideration, the promisee cannot bring an action.

Between the dates of decree nisi and decree absolute on a petition for divorce a husband promised his wife to allow her 100*l.* a year free of tax. The wife forbore to apply to the Divorce Court for maintenance, but not on any request by the husband, express or implied, that she should so forbear. The husband did not pay to his wife the payments he had promised, and, after the lapse of seven years, the wife brought an action in the King's Bench Division on her husband's promise to make those payments to her.

Held, that there was no consideration for the husband's promise, since (1.) the wife had not promised not to apply for maintenance to the Divorce Court, and (2.) even if she had so promised, she could not have deprived herself of that right (see *Hyman* v. *Hyman* [1929] A. C. 601, as explained in *Gaisberg* v. *Storr* [1950] 1 K. B. 107); and also (3.) the wife's actual forbearance to make such an application was not made at the request of her husband, express or implied.

Held, further, that in these circumstances, the principle stated in *Central London Property Trust Ld.* v. *High Trees House Ld.* (supra) and *Robertson* v. *The Minister of Pensions* (supra) afforded the wife no cause of action.

Per Asquith, L.J. It was unnecessary to express any views on the correctness of the decision in *Central London Property Trust Ld.* v. *High Trees House Ld.* (supra), though he, certainly, must not be taken as questioning it. The decision of the House of Lords in *Hyman* v. *Hyman* (supra) was not to be construed as applying only to agreements made before the date of decree absolute.

Per Denning, L.J. He had always understood that no agreement for maintenance, which was made in the course of proceedings for divorce before the date of decree absolute, was valid, unless it should be sanctioned by the Divorce Court. Indeed, he had said so in *Emanuel* v. *Emanuel* [1946] P. 115, 117. He knew that such agreements were often made, but their only valid purpose was to serve as a basis for a consent application to the Divorce Court. The reason why such agreements, unless approved by the court, were invalid, was because they were so apt to be collusive.

Decision of Byrne, J., approved on the issue of consideration, disapproved on the applicability of the principle stated in *Central London Property Trust Ld.* v. *High Trees House Ld.* (supra).

APPEAL from Byrne, J.

The parties, a husband and wife, were married in 1915, but separated in 1939. On February 1, 1943, on the wife's petition, a decree nisi of divorce was pronounced. On February 9, 1943, the wife's solicitor wrote to the husband's solicitor: "With "regard to permanent maintenance, we understand that your "client is prepared to make her an allowance of 100*l*. per year, "free of income tax". On February 19, 1943, the husband's solicitor replied that the husband had "agreed to allow your client "100*l*. per annum, free of tax". On August 11, 1943, the decree was made absolute. The wife's solicitor wrote for the first instalment of 25*l*. on August 26, and asking that future instalments should be paid on November 11, February 11, May 11, and August 11. The husband, himself, replied that he could not be expected to pay in advance. In fact, he never made any payment. The wife pressed for payment but made no application to the Divorce Court for maintenance. She had an income of

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between 700*l.* and 800*l.* a year. Her husband had only 650*l.* a year.

On July 28, 1950, the wife brought an action in the King's Bench Division claiming from her husband 675*l.*, being arrears of payment at the rate of 100*l.* per year for six and three-quarter years. Byrne, J., held that the first three quarterly instalments of 25*l.* were barred by the Limitation Act, 1939, but gave judgment for the wife for 600*l.* He held on the authority of *Gaisberg* v. *Storr* (1) that there was no consideration for the husband's promise to pay his wife 100*l.*, but nevertheless he held that the promise was enforceable on the principle stated in *Central London Property Trust Ld.* v. *High Trees House Ld.* (2) and *Robertson* v. *Minister of Pensions* (3), because it was an unequivocal acceptance of liability, intended to be binding, intended to be acted on and, in fact, acted on.

The husband appealed.

Kee for the husband. The trial judge was right in holding that there was no consideration for this promise by the husband to pay his wife 100*l.* per annum free of income tax. There was no promise by the wife that she would not apply for maintenance to the Divorce Court, and, indeed, had she made such a promise there would have been no consideration for it, since no agreement by her with her husband could deprive her of this right: see *Hyman* v. *Hyman* (4), as interpreted in the Court of Appeal in *Gaisberg* v. *Storr* (5). Though in fact the wife did forbear from applying to the Divorce Court for maintenance, there was no request by the husband, express or implied, that she should do so, and if the wife now made that application she would have to explain the long delay in making the application.

But Byrne, J., held that the husband's promise was enforceable on the principle stated by Denning, J., in *Central London Property Trust Ld.* v. *High Trees House Ld.* (6) and *Robertson* v. *Minister of Pensions* (7). But the principle stated by his Lordship in those cases cannot of itself give a cause of action. Where consideration is an essential part of the cause of action, the doctrine stated in the *High Trees* case (6), in the absence of consideration, cannot take its place. The doctrine does not decide that a promisee can sue on a promise. In neither of the two cases

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(1) [1950] 1 K. B. 107.
(2) [1947] K. B. 130.
(3) [1949] 1 K. B. 227.
(4) [1929] A. C. 601.
(5) [1950] 1 K. B. 107.
(6) [1947] K. B. 130.
(7) [1949] 1 K. B. 227.

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cited was the action brought by the promisee on a promise. This doctrine, it has been said, may be used as a shield and not as a sword; it does not decide that a promisee can sue on such a promise.

Finally, no agreement for maintenance made in the course of divorce proceedings before the date of decree absolute between husband and wife is valid, unless it is sanctioned by the court: see the observations of Denning, J., in *Emanuel* v. *Emanuel* (8).

Peter Robinson for the wife. Where a promise is given which (a) is intended to create legal relations, and (b) is intended to be acted on by the promisee, and (c) is, in fact, acted on, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it: see the *High Trees* case (6) and *Robertson* v. *Minister of Pensions* (7). Such a promise acts as an estoppel or quasi-estoppel. It is just and equitable that if such a promise with those conditions can be used as a shield by the promisee, he can also use it as a sword and sue upon it, and in such case the promisor should not be allowed to plead that his promise is not binding on him: the promisor is estopped from denying his promise. The reasoning which it has been established affords the promisee in such a case a defence, is good to afford him also the weapon of a cause of action. Consideration is not necessary in such a case, where such a promise has been acted on to the detriment of the promisee.

[Counsel then contended that from the correspondence it appeared that the agreement of the husband to pay the wife 100*l*. a year free of income tax was made after the date of decree absolute.]

The agreement having been made after the date of decree absolute, there was no agreement not to invoke the jurisdiction of the court or to control the process of the court when its jurisdiction had been invoked: see the speech of Lord Hailsham, L.C., in *Hyman* v. *Hyman* (9). Such an agreement was not open to objection and was made for valid consideration.

Further, in any case, there was consideration for the promise: the wife forbore from doing what she was entitled to do—to apply to the Divorce Court for maintenance. This she did in consequence of her husband's promise. And thus a forbearance was to her detriment, in that at the present time she must apply to the court for leave to make the application, with the probability that permanent maintenance would not be granted from the date of decree absolute—some seven years ago. Such forbearance was good consideration for the promise and a request for such forbearance, if necessary, will be implied on the part of the husband.

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(8) [1946] P. 115, 117.

(9) [1929] A. C. 601, 609, 614.

Kee replied.

DENNING, L.J. [after stating the facts:] Much as I am inclined to favour the principle stated in the *High Trees* case (10), it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties. That is the way it was put in *Hughes* v. *Metropolitan Railway* (11), the case in the House of Lords in which the principle was first stated, and in *Birmingham, etc., Land Company* v. *London and North-Western Railway Co.* (12), the case in the Court of Appeal where the principle was enlarged.. It is also implicit in all the modern cases in which the principle has been developed. Sometimes it is a plaintiff who is not allowed to insist on his strict legal rights. Thus, a creditor is not allowed to enforce a debt which he has deliberately agreed to waive, if the debtor has carried on business or in some other way changed his position in reliance on the waiver: *In re William Porter & Co. Ld.* (13); *Buttery* v. *Pickard* (14); the *High Trees* case (10); and *Ledingham and Others* v. *Bermejo Estancia Co. Ld.* (15). A landlord, who has told his tenant that he can live in his cottage rent free for the rest of his life, is not allowed to go back on it, if the tenant stays in the house on that footing: *Foster* v. *Robinson* (16). On other occasions it is a defendant who is not allowed to insist on his strict legal rights. His conduct may be such as to debar him from relying on some condition, denying some allegation, or taking some other point in answer to the claim. Thus a government department, which had accepted a disease as due to war service, were not allowed afterwards to say it was not, seeing that the soldier, in reliance on the assurance, had abstained from getting further evidence about it: *Robertson* v. *Minister of Pensions* (17). A buyer who had waived the contract

(10) [1947] K. B. 130.
(11) (1877) 2 App. Cas. 439, 448.
(12) (1888) 40 Ch. D. 268, 286.
(13) [1937] 2 All E.R. 361.
(14) [1946] W. N. 25.
(15) [1947] 1 All E. R. 749.
(16) [1951] 1 K. B. 149, 156.
(17) [1949] 1 K. B. 227.

date for delivery was not allowed afterwards to set up the stipulated time as an answer to the seller: *Charles Rickards Ld.* v. *Oppenhaim* (18). A tenant who had encroached on an adjoining building, asserting that it was comprised in the lease, was not allowed afterwards to say that it was not included in the lease: *J. F. Perrott & Co. Ld.* v. *Cohen* (19). A tenant who had lived in a house rent-free by permission of his landlord, thereby asserting that his original tenancy had ended, was not afterwards allowed to say that his original tenancy continued: *Foster* v. *Robinson* (16). In none of these cases was the defendant sued on the promise, assurance, or assertion as a cause of action in itself: he was sued for some other cause, for example, a pension or a breach of contract, and the promise, assurance or assertion only played a supplementary rôle—an important rôle, no doubt, but still a supplementary rôle. That is, I think, its true function. It may be part of a cause of action, but not a cause of action in itself.

The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.

Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge. I fear that it was my failure to make this clear which misled Byrne, J., in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. That is not correct. The wife can only enforce it if there was consideration for it. That is, therefore, the real question in the case: was there sufficient consideration to support the promise?

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(16) [1951] 1 K. B. 149, 156.
(18) [1950] 1 K. B. 616, 621–3.
(19) [1951] 1 K. B. 705.

If it were suggested that, in return for the husband's promise, the wife expressly or impliedly promised to forbear from applying to the court for maintenance—that is, a promise in return for a promise—there would clearly be no consideration, because the wife's promise was not binding on her and was therefore worth nothing. Notwithstanding her promise, she could always apply to the Divorce Court for maintenance—maybe only with leave—and no agreement by her could take away that right: *Hyman* v. *Hyman* (20), as interpreted by this court in *Gaisberg* v. *Storr* (21).

There was, however, clearly no promise by the wife, express or implied, to forbear from applying to the court. All that happened was that she did in fact forbear—that is, she did an act in return for a promise. Is that sufficient consideration? Unilateral promises of this kind have long been enforced, so long as the act or forbearance is done on the faith of the promise and at the request of the promisor, express or implied. The act done is then in itself sufficient consideration for the promise, even though it arises ex post facto, as Parker, J., pointed out in *Wigan* v. *English and Scottish Law Life Assurance Association* (22). If the findings of Byrne, J., were accepted, they would be sufficient to bring this principle into play. His finding that the husband's promise was intended to be binding, intended to be acted upon, and was, in fact, acted on—although expressed to be a finding on the *High Trees* principle—is equivalent to a finding that there was consideration within this long settled rule, because it comes to the same thing expressed in different words: see *Oliver* v. *Davis* (23). But my difficulty is to accept the finding of Byrne, J., that the promise was "intended to be acted upon". I cannot find any evidence of any intention by the husband that the wife should forbear from applying to the court for maintenance, or, in other words, any request by the husband, express or implied, that the wife should so forbear. He left her to apply if she wished to do so. She did not do so, and I am not surprised, because it is very unlikely that the Divorce Court would have then made any order in her favour, seeing that she had a bigger income than her husband. Her forbearance was not intended by him, nor was it done at his request. It was therefore no consideration.

(20) [1929] A. C. 601.
(21) [1950] 1 K. B. 107.
(22) [1909] 1 Ch. 291, 298.
(23) [1949] 2 K. B. 727.

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It may be that the wife has suffered some detriment because, after forbearing to apply to the court for seven years, she might not now be given leave to apply: *Scott* v. *Scott* (24). The court is, however, nowadays much more ready to give leave than it used to be (see *Fisher* v. *Fisher* (25) and *Hasting* v. *Hasting* (26)), and I should have thought that, if she fell on hard times, she would still obtain leave. Assuming, however, that she has suffered some detriment by her forbearance, nevertheless, as the forbearance was not at the husband's request, it is no consideration. In *Scott* v. *Scott*, where a maintenance agreement was made during divorce proceedings, Scrutton, L.J., did say that he had no doubt about there being consideration for it (27), but this must now be taken to be erroneous, having regard to *Hyman* v. *Hyman* (28) and *Gaisberg* v. *Storr* (29).

The doctrine of consideration is sometimes said to work injustice, but I see none in this case, nor was there any in *Oliver* v. *Davis* (30) or *Gaisberg* v. *Storr* (29). I do not think it would be right for this wife, who is better off than her husband, to take no action for six or seven years and then come down on him for the whole 600*l*.

The truth is that in these maintenance cases the real remedy of the wife is, not by action in the King's Bench Division, but by application in the Divorce Court. I have always understood that no agreement for maintenance, which is made in the course of divorce proceedings prior to decree absolute, is valid unless it is sanctioned by the court. Indeed, I said so in *Emanuel* v. *Emanuel* (31). I know that such agreements are often made, but their only valid purpose is to serve as a basis for a consent application to the court. The reason why such agreements are invalid, unless approved, is because they are so apt to be collusive. Some wives are tempted to stipulate for extortionate maintenance as the price of giving the husband his freedom. It is to remove this temptation that the sanction of the court is required. It would be a great pity if this salutary requirement could be evaded by taking action in the King's Bench Division. The Divorce Court can order the husband to pay whatever maintenance is just. Moreover, if justice so requires, it can make the order retrospective to decree absolute. That is the proper

(24) [1921] P. 107.
(25) [1942] P. 101.
(26) [1948] P. 68.
(27) [1921] P. 107, 127.
(28) [1929] A. C. 601.
(29) [1950] 1 K. B. 107.
(30) [1949] 2 K. B. 727.
(31) [1946] P. 115.

remedy of the wife here, and I do not think she has a right to any other.

For these reasons I think the appeal should be allowed.

Birkett, L.J. I agree. There were two points before the judge, both clearly stated and both clearly argued. The first, whether there was consideration for this agreement to pay 100*l.* a year free of tax, was disposed of by the judge almost in a sentence. He said in fact that on the authority of *Gaisberg* v. *Storr* (32) there could be no doubt that the decision in that case applied to the facts of the case before him. After reciting *Gaisberg* v. *Storr* (32), he said: "In that case it was held that "the only consideration moving from the wife for the husband's "undertaking, which could be deduced by inference from the "circumstances, would be an undertaking by the wife not to "apply to the court for alimony pendente lite or for permanent "maintenance, but that any promise by the wife to refrain from "so applying was void and unenforceable, and the learned Lords "Justices all gave judgment to that effect. . . . At first sight "that would appear to be conclusive, but Mr. Rawlinson, on "behalf of the plaintiff, pointed out that the whole of the argu"ment in the case of *Gaisberg* v. *Storr* (32), and, therefore, the "whole matter to which the court was directing its attention, "was concerned with the question whether forbearance to apply "for permanent maintenance was good consideration, and from "an examination of the judgments in that case, and of the "arguments, it plainly appears that that was the matter, and "the only matter, which was being considered in that case". Then he continued: "But Mr. Rawlinson says: 'In this case "'it is not suggested that there was consideration'".

I have been looking at the evidence which was given in the court below; and the agreement, about which all this subsequent trouble has arisen, was made as early as February in 1943, the decree absolute in the case not being made until August 11. But there does not appear, as I read it, anywhere in the evidence a request by the husband that the wife should refrain from going to the court, or a promise by the wife that she would not go to the court, or any matter of that kind. It appears simply to have been that after some little talk in February, 1943, there was an agreement come to that the husband would pay 100*l.* a year; and then the wife amended it to 100*l.* a year free of tax;

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(32) [1950] 1 K. B. 107.

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and then by March 5 that was recorded in a letter. It seems on the first point, therefore, that there was no consideration for this agreement. If I may be permitted to do so, I will quote the words of Asquith, L.J., in *Gaisberg* v. *Storr* (33): "The only "consideration which could be deduced by inference from the "circumstances would be an undertaking by the wife, in "exchange for the husband's undertaking, not to apply to the "court for alimony pendente lite or permanent maintenance; "but any promise given by her to refrain from so applying would "have been void and unenforceable on the principle laid down "in *Hyman* v. *Hyman* (34). In those circumstances I think "that there is no evidence at all of any consideration moving "from the wife to the husband, and that the agreement in the "document is not a binding contract". The judge, as I said, dismissed this matter in a sentence by saying that the law was so clear that it was not possible for the case to be argued on that ground.

With regard to the second point, I think that the description given by Mr. Kee of the doctrine enunciated in the two cases to which Denning, L.J., has referred, as one to be used as a shield and not as a sword, is very vivid. Denning, J., in *Central London Property Trust Ld.* v. *High Trees House Ld.*, concluded his judgment with these words (35): "I prefer to apply "the principle that a promise intended to be binding, intended "to be acted upon, and in fact acted upon, is binding so far as "its terms properly apply". If a husband who admittedly had entered into an agreement of this kind were in some way to try and take advantage of it, the doctrine would apply. So far as the wife is concerned, it would appear to be plain that her rights of applying to the court for maintenance are still theoretically in full force, for in *Fisher* v. *Fisher* Lord Greene, M.R., discussing *Scott* v. *Scott* (36), said (37): "Scrutton, L.J., "expressed his conclusion where he said: 'Without going "'through the other cases, seven or eight of which I have "'referred to while counsel have been arguing this case, I think "'in this particular case the application ought to have been "'made within a reasonable time after the decree for dissolu"'tion, and I see nothing whatever in the circumstances of this "'case to justify an application being made seven years after

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(33) Ibid. 114.
(34) [1929] A. C. 601.
(35) [1947] K. B. 130, 136.
(36) [1921] P. 107.
(37) [1942] P. 101, 106.

" 'the decree' ". Then Lord Greene, M.R., continued: "He "carefully refrained from saying that in any circumstances seven "years would have been too long. Warrington, L.J., is equally "cautious in the language which he used. It seems to me that "that authority does not in any way preclude us from saying "that, on the facts of any particular case, a reasonable time may "be as much as seven years or even longer".

Mr. Kee argued that if an application were made to the court at this date for maintenance, it would be necessary to explain the long delay in the making of the application. As one of the material circumstances for the court to consider, I cannot conceive of a better one than that the wife mistakenly relied upon an agreement which, much to her surprise, when it came before the court was held to be invalid.

In all those circumstances I agree with the judgment which has been given. The trial judge was certainly right in saying that there was no consideration for the agreement; and I think that he misunderstood and misapplied the principle laid down in the two cases which have been cited.

ASQUITH, L.J. I agree with my Lords and would add nothing but for the fact that we are disagreeing with the judgment of Byrne, J.

The judge has decided that, while the husband's promise was unsupported by any valid consideration, yet the principle in *Central London Property Trust Ld.* v. *High Trees House Ld.* (38) entitles the wife to succeed. It is unnecessary to express any view as to the correctness of that decision, though I certainly must not be taken to be questioning it; and I would remark, in passing, that it seems to me a complete misconception to suppose that it struck at the roots of the doctrine of consideration. But assuming, without deciding, that it is good law, I do not think, however, that it helps the plaintiff at all. 'What that case decides is that when a promise is given which (1.) is intended to create legal relations, (2.) is intended to be acted upon by the promisee, and (3.) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it.' It does not, as I read it, decide that a promisee can sue on the promise. On the contrary, Denning, J., expressly stated the contrary. Neither in the *High Trees* case (38) nor in *Minister of Pensions* v. *Robertson* (39)

(38) [1947] K. B. 130.

(39) [1949] 1 K. B. 227.

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(another decision of my Lord which is relied upon by the plaintiff) was an action brought by the promisee on the promise. In the first of those two cases the plaintiff was in effect the promisor or a person standing in the shoes of the promisor, while in the second the claim, though brought by the promisee, was brought upon a cause of action which was not the promise, but was an alleged statutory right.

Then it is said for the wife that the husband's agreement to pay 100*l*. a year was supported by good consideration, which consisted either of an implied undertaking by the wife not to apply to the court for an order for permanent maintenance, or of an actual forbearance so to apply. As to the first of these, if the agreement was made before the decree absolute *Hyman* v. *Hyman* (40), beyond question, decided that such agreement to abstain from resorting to the court is not valid consideration.

It is said, however, first that the material agreement was not made before the decree absolute, but was made after, and that such an agreement made after the decree absolute is not open to objection and is made for valid consideration. Alternatively, it is argued that even if such an agreement is not good consideration, an actual forbearance to apply to the court, is.

As to the first of these points, in my judgment the material agreement was made shortly after the decree nisi and long before the decree absolute. The correspondence after the decree absolute contained merely a request by the wife that an agreement assumed to have been validly made in the previous February should be carried out by means of quarterly payments, followed in the October letters, by a consent by the husband to pay quarterly with a suggestion of different quarter days. This cannot, in my view, constitute a contract—a contract made after the decree absolute; but if it were so, I consider on the whole that *Hyman* v. *Hyman* (40), a decision of the House of Lords, is not to be construed as applying only to agreements made before decree absolute. I think that its application is perfectly general. It contains no such limitation in time as has been suggested. I am of opinion, further, that *Hyman* v. *Hyman* (40) is incidentally inconsistent with the dicta of Scrutton, L.J., in *Scott* v. *Scott* (41). Finally, I do not think an actual forbearance, as opposed to an agreement to forbear to approach the court, is a good consideration unless it proceeds from a request, express or implied, on the part of the promisor. If not moved by such a request, the forbearance is not in respect of the promise.

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(40) [1929] A. C. 601.

(41) [1921] P. 107, 127.

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For these reasons, and for the others given by my Lords, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Braikenridge & Edwards; Lee & Pembertons.*

C. G. M.

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Mines—Industrial diseases—Workmen's compensation—Disease certified after nationalization of mines—Compensation paid by National Coal Board—Contribution by "other employers"—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 1 (*iii*) (*c*) (*iii*)—*Coal Mining Industry (Pneumoconiosis) Compensation Scheme,* 1943 (*St. R. & O.* 1943, *No.* 885), *s.* 8—*Coal Industry Nationalization Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *s.* 10, *sub-s.* 3.

The Workmen's Compensation Act of 1925, by s. 43, provides that where a workman is duly certified to be disabled by an industrial disease which is due to the nature of the employment in which he is employed, compensation shall be recoverable from the employer who last employed him in that employment, provided that if the disease was of such a nature as to be contracted by a gradual process "any other employers" who during a specified period employed the workman in the employment to the nature of which the disease was due should be liable to make to the employer from whom compensation was recoverable such contributions as, in default of agreement, might be determined by arbitration under the Act.

After the Coal Industry Nationalization Act, 1946, came into operation on January 1, 1947, two miners who had previously been employed by the defendant colliery company, and after the vesting date had continued to work in the same mine and in the same employment for the National Coal Board, were certified to be suffering, one from miner's nystagmus, and the other from pneumoconiosis, both industrial diseases "of a nature to be con-"tracted by a gradual process". The board, having paid the workmen compensation, claimed contributions from the defendant colliery owners as "other employers" within the meaning of s. 43. The defendants contended that they were not "other employers" within the meaning of s. 43 of the Act of 1925, that the Act of 1946

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impliedly repealed s. 43, and also that the tribunal constituted to determine the global sum of compensation payable under the Act of 1946 to the colliery owners had fixed a sum which relieved the colliery owners of the liability to contribution.

Held, by Somervell and Denning, L.JJ., Singleton, L.J., dissenting, that the board were not entitled to the contribution claimed.

Per Somervell, L.J. Although in the case of a miner contribution would normally arise where a man had gone from one mine to another mine owned by another colliery company, the words of the proviso to s. 43 covered the case where a man continued to work in the same mine but for a new employer who had taken over the mine. Therefore, the colliery company were "other employers". Nevertheless, the board's claim failed because the terms of reference to the compensation tribunal led to the conclusion that the tribunal had fixed a figure for compensation which relieved the colliery owners of liability to contribute.

Per Singleton, L.J. The provisions in s. 43 of the Workmen's Compensation Act, 1925, as to contribution by "other employers" were sufficiently wide to cover the present case. The words "other "employers" must be given their ordinary meaning. The Act of 1946 contained no provision for the transfer to the Coal Board of the colliery owners' statutory liabilities. It was obvious that in arriving at the global sum of fair compensation there must be a difference between a case where all liabilities were taken over and a case in which the previous owner of the assets was left saddled with certain liabilities. If the assets were taken over and the liabilities remained the compensation would be greater. That was axiomatic. Any other view would not lead to fair compensation and would mean that the tribunal had not had regard to all relevant circumstances. The court ought to conclude that the tribunal gave consideration to the matter of liability for workmen's compensation. The tribunal might have thought that the colliery owners were sufficiently covered by insurance or trust funds, or they might have thought that the employers were not covered, and therefore have allowed for that liability in arriving at the fair compensation. As the parties had not adduced any material on which the court could consider that question, it was to be assumed that the tribunal had considered the matter and had acted according to the terms of reference.

Per Denning, L.J. On the true construction of the Coal Industry Nationalization Act, 1946—and see in particular, ss. 8 and 9—a workman was to be regarded as if he had entered the employment of the National Coal Board, not on the vesting date but at the time when he entered the employment of the colliery owners. Therefore those employers were not "other employers" within the meaning of s. 43 of the Act of 1925, and on that ground the board's claim must fail. Their claim also failed on the broader ground that, on all sound principles of interpretation, s. 43 of the Workmen's Compensation Act, 1925, should be restricted to the circumstances contemplated by Parliament when that Act was passed, and should not be extended to a state of affairs whereby a whole industry became nationalized. If, therefore, the claim of the Coal Board was to be made good, it must be done by means of something in the Coal Industry Nationalization Act, 1946, but there was nothing in that Act which gave the board any right of contribution from former colliery owners. Accordingly, the board had no right of contribution from the former colliery owners because the Act of 1946 did not give it, and it was illegitimate for the board to refer back to the Act of 1925 which was passed for an altogether different purpose.

APPEAL from Judge Trevor Morgan, K.C., sitting at Llanelly county court.

On May 12, 1950, the National Coal Board, which under the Coal Industry Nationalization Act, 1946, had taken over the working and running of the coal mines of Great Britain as from January 1, 1947, the vesting day under that Act, instituted proceedings against Amalgamated Anthracite Collieries Ld., claiming contribution in respect of workmen's compensation paid to two workmen, Davies and Jenkins, who had prior to the vesting date been in the employ of the company and afterwards, until certified to be suffering from an industrial disease, had been in the service of the board, in the same employment. Davies, who had been employed as a miner by the colliery company from 1932, was certified on October 20, 1947, to be suffering from miner's nystagmus, and Jenkins, who also had been for many years in the employment of the company, was certified on April 13, 1948, to be suffering from pneumoconiosis. Each is an industrial disease of gradual development.

The claim of the board to contribution in respect of the compensation paid to Davies was based on s. 43, sub-s. 1 (i) (iii) (*c*), proviso (iii), of the Workmen's Compensation Act, 1925, which provides that where a workman has been certified as suffering from an industrial disease which is of such a nature as to be contracted by gradual process, "any other employers" who during the prescribed period employed the workman in the employment to the nature of which the disease was due should be liable to make contribution to the employer from whom compensation was recoverable by the workman. The board contended that the colliery company were "other employers" within the meaning of s. 43.

The board's claim in the case of Jenkins was based on s. 8 of the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, the provisions of which are in all material respects the same as s. 43 of the Act of 1925.

The applications of the board were heard on October 10, 1950, and were dismissed by the county court judge, who held that the colliery company were not "other employers" within the meaning of s. 43. The board appealed.

Paull, K.C., *Diplock, K.C.*, and *Sir S. Worthington-Evans* for the National Coal Board. It is submitted that the defendant colliery owners are clearly "other employers" within the meaning of s. 43, and that the provisions of the Act of 1946, so far from impliedly repealing the contribution provisions of the Act of 1925, are quite inconsistent with such an argument.

As for the terms of reference to the tribunal for the assessment of the compensation payable under the Act of 1946 for the transfer of certain assets of the mines to public ownership, unless they amount in some way to an estoppel, the court should not consider them. It is unnecessary to ask the court to determine whether the terms of reference are material to the present issue, because that was not argued in the court below, and it was not pleaded that they act as an estoppel. What the colliery owners were compensated for was loss of future profits—something which they would have got if the industry had not been nationalized and the workmen were still working for them. The fact that a statute says that assets shall be calculated in a certain way cannot transfer a liability. There is no evidence of what took place before the tribunal, and the onus of showing that the compensation received is on the basis of the colliery owners' being relieved of this liability to contribution rests on the colliery owners. If they do not discharge that onus they cannot take advantage of that argument. Moreover, since the Workmen's Compensation (Coal Mines) Act, 1934, the colliery owners have been under a statutory duty to insure their workmen against industrial diseases. That would be known by the tribunal. It is not a change of employment that is contemplated by s. 43 but a change of employers, and the workmen by continuing to work in the mine for the Coal Board after the vesting day must be taken to have made a new contract of service.

Sir Walter Monckton, K.C., and *J. W. Brunyate* for the colliery company. Having regard to the provisions of the Act of 1946, and in particular to Sch. II to that Act, the colliery company is not an "other employer" within the meaning of s. 43 of the Act of 1925. Alternatively, it is submitted, if the colliery company is an "other employer", its liability to contribution has been impliedly extinguished or repealed by the Act of 1946. No express provision preserving that liability is to be found in the Act of 1946, and the terms of reference to the tribunal which was set up to determine the aggregate amount of compensation to be paid in respect of the transferred interests make it clear that the tribunal must have taken that liability into account and fixed a global figure which relieved the colliery owners of liability in respect of the contribution.

By para. 2 of Sch. II to the Act of 1946, contracts within that Schedule are treated as something which is going on, with merely the substitution of a new employer's name for the name of the old employer, and with the old conditions continuing. If a workman is continued in the same employment, on the same terms, the only change being the substitution of the Coal Board for the colliery company as the employers, he must be treated as being employed by the same employer.

The terms of reference to the tribunal are referred to in s. 10, sub-s. 3, of the Act of 1946, and the court is entitled to look at them. They require the tribunal, in determining the global sum required, to provide fair compensation to the mine owners for the transfer of the assets to public ownership and to ascertain the amount which those assets might be expected to realize if sold as one unit in the open market, as the assets of a going concern, on the basis of (a) the net annual maintainable revenue, i.e., the net annual revenue which the assets as a whole might reasonably be expected to earn in the future if not transferred to public ownership, and (b) the number of years' purchase to be implied. As a relevant matter in such a computation the tribunal must be assumed to have taken into consideration the estimated expense of compensating workmen disabled in the future, and to have deducted it from the estimated future revenue.

Paull, K.C., replied.

Cur. adv. vult.

March 21. The following judgments were read:—

Somervell, L.J. This appeal concerns two applications under the Workmen's Compensation Act, 1925. The applicants are the National Coal Board, the statutory body which under the Coal Industry Nationalization Act, 1946 (hereinafter called the Act of 1946) took over—to use general words which will not prejudge any issue—the working and running of the coal mines of Great Britain as from the vesting day, January 1, 1947. The first case concerns one Davies, who, on October 20, 1947, was certified within s. 43 of the Workmen's Compensation Act as suffering from miner's nystagmus. He was at that time in the employment of the board. The second case concerns one Jenkins, who, on May 3, 1948, was certified within the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, as suffering from pneumoconiosis. For the purposes of the present appeal there are no material differences between the provisions of s. 43 and the Scheme. I propose, therefore, to consider Davies' case. The conclusion in that case will cover the other case.

The Amalgamated Anthracite Collieries Ld., the respondents to the applications, hereinafter called the colliery company, were before the vesting day the owners of the mine in which Davies worked, and in which he continued to work after that day, until he was certified on October 20, 1947. Section 43 applies the Workmen's Compensation Act to certain industrial diseases, including nystagmus, which are due to the nature of the workman's employment. Mr. Davies had been in the employment of the colliery company from 1932 down to the end of 1946, when the board took over.

[His Lordship read the relevant provisions of s. 43 (1), and continued:] The issue depends on sub-s. 1 (i) (iii) (*c*), proviso (iii). It is not disputed that nystagmus was due to the nature of Mr. Davies' employment while he was working for the colliery company and for the board. As will be seen from the dates, twelve months from the date of certification takes one back to October 21, 1946, when he was in the employment of the colliery company. As I have given the date of certification in Jenkins' case I should say that under the Pneumoconiosis Scheme the period for contribution is not one year but five years.

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(1) Workmen's Compensation Act, 1925, s. 43, sub-s. 1: "Where—(i) "the certifying surgeon appointed "under the Factory and Workshop "Act, 1901, for the district in which "a workman is employed certifies "that the workman is suffering from "a disease mentioned in the Third "Schedule to this Act and is thereby "disabled from earning full wages "at the work at which he was "employed or . . . (iii) the death "of a workman is caused by any such "disease; and the disease is due to "the nature of any employment in "which the workman was employed "at any time within the twelve "months previous to the date of the "disablement or suspension, whether "under one or more employers, he "or his dependants shall be entitled "to compensation under this Act as "if the disease or such suspension as "aforesaid were a personal injury by "accident arising out of and in the "course of that employment, subject "to the following modifications . . . "(*c*) The compensation shall be "recoverable from the employer who "last employed the workman during "the said twelve months in the "employment to the nature of which "the disease was due: Provided that ". . . (iii) if the disease is of such "a nature as to be contracted by "a gradual process, any other "employers who during the said "twelve months employed the workman in the employment to the "nature of which the disease was due "shall be liable to make to the "employer from whom compensation "is recoverable such contributions as, "in default of agreement, may be "determined in the arbitration under "this Act for settling the amount of "the compensation, or, if the amount "of compensation is not in dispute, "as may be determined by arbitration under this Act".

It is admitted that nystagmus is of such a nature as to be contracted by a gradual process. In their particulars of claim the board state, and this is not disputed, that as the last employers of Mr. Davies they became liable to pay him compensation in respect of the said disease. They then claim to be entitled under the provisions of s. 43 to contribution from the colliery company as an " other employer " who during the twelve months previous to the date of disablement employed the workman in the employment to the nature of which the disease was due.

The defence raised by the colliery company is twofold: it is submitted, first, that having regard to the Act of 1946, and in particular to Sch. II to that Act, the colliery company is not an " other employer " within s. 43. Alternatively, it is submitted that, assuming that the colliery company is an other employer, the right to contribution has been impliedly extinguished or repealed by the Act of 1946. Reliance for this purpose is placed on the absence of any express provision preserving it, and more strongly on the terms of reference to the tribunal which had been set up to determine the aggregate amount of the compensation to be made in respect of the transferred interests. These terms of reference are referred to in s. 10, sub-s. 3, of the Act of 1946.

I will refer first to the scheme of the Act in broad outline and to those provisions on which the first point depends. The Act of 1946 set up a National Coal Board who, as from the vesting date, were to work and get coal in Great Britain to the exclusion of others. The long title describes the Act as one " to establish " public ownership and control of the coal-mining industry and " certain allied activities ". Sections 5 to 9 concern the transfer of the assets from the various colliery companies by whom the industry was carried on to the board. Under s. 5 and Sch. I certain assets—the unworked coal and certain plant and equipment—were transferred without option: certain other assets were transferable at the option of board or owner: in respect of other assets, if one party wanted transfer and the other objected, there was provision for arbitration. That was the broad scheme. Section 7 and Sch. II concerned rights and liabilities under contracts, and these require examination in some detail. Section 7, sub-s. 1, is as follows: " Subject to the provisions of this section, " contracts such as are mentioned in the Second Schedule to " this Act shall have effect in favour of and against the board as " therein mentioned and to the extent therein mentioned ". In sub-ss. 2 to 5 there are special provisions with regard to contracts entered into after August 1, 1945, which do not affect the present issue.

Paragraph 1, sub-para. 1, of Sch. II provides that, subject to certain limitations, only one of which is relevant, the Schedule shall apply to the provisions of any contract so far as they are provisions entered into in the course, or for the purposes, of any coal industry activities or for the purposes of the utilization or disposal of things owned or used for any such activities. This, of course, would cover contracts of service with miners such as Mr. Davies. Paragraph 1, sub-para. 3, excepts certain provisions of contracts which are within the Schedule by reason of the preceding paragraphs. Sub-para. (*c*) excepts provisions for or in connexion with pensions, gratuities or other like benefits. Mr. Paull, for the board, for reasons which will become apparent, relied on this as showing that contracts of service, in so far as they contained such provisions, were to that extent altered by the Schedule.

The transfer was dealt with in para. 2 (2). The broad position is clear. The board did not take over pre-vesting date rights or liabilities. In respect of performance due by either party after that date the board are substituted for the original owner. There is a power to make regulations for apportionments: see para. 4 (*b*). No such regulations were actually put in, but in the case of a contract of service the intention would seem plain: the colliery companies pay whatever is due, apportioned if necessary, up to the vesting day and the board pay what is due thereafter.

It is in the main on the provisions of Sch. II that Sir Walter Monckton and Mr. Brunyate, on behalf of the colliery company, rely for their submission that the company is not an "other "employer" within s. 43. This submission commended itself to the county court judge and has been accepted by my brother Denning. I have, for reasons which I will state, come to a different conclusion. It is, I think, right to say that the normal case contemplated by the proviso to sub-s. 1 is that of a man who has moved from an undertaking in which a disease-producing process was carried on to another undertaking where he continued to work at the same process. In the case of a miner the ordinary case for contribution would be where the miner had gone from one mine owned by one colliery company to another mine owned by another colliery company. On the other hand, the words of the proviso seem to me to cover a case where the man continued to work in the same mine, but for a new employer, who had taken over the mine. If the disease was certified within the twelve months the new employer would claim a contribution from the former employer unless, under the terms of transfer, he had agreed to relinquish that right. Counsel for the colliery company do not, I think, dispute that at any rate in certain circumstances this might be so. They rely on the words which I have read from para. 2 of Sch. II. They rely on the fact that the provisions of the contract remain unaltered, though the board are substituted as the party to it. They submit that there has been no change in the employment, and therefore no other employer within the proviso.

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(2) Coal Industry Nationalization Act, 1946, Second Sched., para. 2: " Provisions of a contract being pro- " visions to which this schedule " applies shall have effect in favour " of and against the board so far as " the performance thereof is due " under the contract on or after the " primary vesting date (or, where the " application of this schedule depends " upon the vesting of an interest in " the board by virtue of the exercise " of an option, on or after the date of " its vesting), as if the board had " been a party to the contract instead " of the concern, subsidiary or owner " mentioned in sub-para. (1) or (2) " of para. 1 of this schedule: Provided " that—(*a*) rights and liabilities in " respect of payments due on or after " the date aforesaid for goods or " utilities delivered or supplied before " that date, or for work done or ser- " vices rendered before that date, " shall be excepted from the opera- " tion of this paragraph ".

The question under the proviso is not, as it seems to me, whether there has been a change in the employment in its terms or conditions but whether, within the twelve months, the workman has been employed by an employer other than the employer from whom compensation is recoverable. To this question there seems to me to be only one answer. The employer from whom compensation is recoverable is the board, but within the twelve months Davies was employed by the colliery company.

Sir Walter Monckton, for the colliery company referred to s. 9, sub-s. 2, of the Workmen's Compensation Act, 1925, which reads as follows: "The rules for calculating the weekly pay-"ment in the case of total incapacity shall be—(i) The weekly "payment shall subject to rule (ii) be a sum not exceeding fifty "per cent. of the workman's average weekly earnings during the "previous twelve months, if he has been so long employed by "the same employer, but if not, then for any less period during "which he has been in the employment of the same employer". He submitted that if a workman had been continued on the same terms, although B had been substituted for A as employer, the sub-section should be applied as if the workman had been employed by the same employer throughout. This seems to me in conflict with the words of the sub-section. The question under s. 43, as under s. 9, sub-s. 2 (i), is has he been employed throughout by the same employer. The question whether the terms are the same is irrelevant. If the question was whether the terms of employment have been altered, there is, I think, force in Mr. Paull's point based on the provision with regard to pensions and gratuities. On the view I take it is unnecessary to rely on this, nor was there any evidence in relation to Davies' contract. I also do not accept the submission made on behalf of the colliery company that there was no "change of employ-"ment". In a contract of employment the identity of the employer is a fundamental term of the employment.

I will now turn to the second argument submitted by the colliery company. This is based in the main on s. 10, sub-s. 3, of the Act of 1946 (3) and the terms of reference therein referred to. Mr. Paull submitted in the first place, on behalf of the board, that the court could not consider the terms of reference as relevant to the legal rights of the parties to the appeal. I do not take this view. They are in my view prima facie in the same position as if they were set out in a schedule. They are made part of the statutory scheme on the all-important question of the sum to be paid. I say prima facie because if a conflict emerged between the terms of reference and a provision of the Act it might be relevant to take into account the fact that the terms of reference had been settled before the Act was passed and could not be amended. No such question in my view arises.

[His Lordship read para. 3 of the terms of reference (4), and continued:] The argument for the colliery company may be summarized as follows: the paragraph requires the tribunal to assess the net annual maintainable revenue which the assets would have earned if not transferred. But for the transfer the owners as a whole would have had to bear the whole expense of compensating Davies. Whether a right of contribution existed or not is irrelevant, as the tribunal are considering the net revenue of the industry as a whole. Therefore, it is said, the tribunal must be taken to have deducted from the estimated future revenue the whole of the estimated expense of compensating workmen disabled in the future.

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(3) Coal Industry Nationalization Act, 1946, s. 10, sub-s. 3: "The "aggregate amount of the compensa-"tion to be made in respect of the "coal industry value of all the trans-"ferred interests shall be a sum "fixed, in accordance with the terms "of reference specified in the agree-"ment made in that behalf before "the passing of this Act between the "Minister and the Mining Associa-"tion of Great Britain, by a tribunal "constituted as therein specified".

(4) Coal Industry Nationalization, 1945, Cmd. Paper 6716: "The tri-"bunal shall determine the global sum "required to provide fair compensa-"tion to the owners of the assets "described in Annex I hereto for "the transfer of those assets to "public ownership, and for that pur-"pose shall ascertain the amount "which the assets might be expected "to realise if sold as one unit in the "open market as assets of a going "concern by a willing seller to a "willing buyer on the basis of (a) the "net annual maintainable revenue, "that is to say the net annual "revenue which the assets as a whole "might reasonably be expected to "earn in the future, if they were "not transferred to public ownership, "and (b) the number of years' pur-"chase to be applied thereto".

I will put the argument in a slightly different way, using some simple figures to illustrate it. I will assume that the incidence of industrial disease was stable. If the curve was upwards or downwards that no doubt would be taken into account but would not affect the present problem. I will take purely nominal figures for my illustration. I assume that every year there are twenty men with industrial diseases being paid 100*l.* each. Each year one man dies or recovers and one new case is certified. It may be that in respect of that new case the last employer can collect four-fifths of the liability from another employer. This is irrelevant in considering the net maintainable revenue of the industry as a whole. For purposes of assessing net maintainable revenue, which assuming stability would be based on past experience, the deduction would be 2,000*l.*, which would year by year "take care of" this liability. If in a case certified after the vesting date the board can recover four-fifths from the owners, this would be putting on them, the owners, a burden additional to the 2,000*l.* which covers the full liability and which they have borne by the reduction of the gross revenue by that sum.

I will now seek to formulate the argument for the board. It is common ground that the board are not liable in respect of pre-vesting day accidents, whether actual accidents or industrial diseases certified before that day. Under s. 43 an industrial disease is treated as an accident which happens over a period of time. As a matter of machinery, and for the convenience of the workman, the last employer is made liable to the workman. If one assumes a man certified a week after the vesting date the "accident" has occurred in the main while the man was in the employment of the colliery company, and as the result of work of which it had the benefit. It would be contrary to the scheme, as well as to the letter of s. 43, that this, which is in effect treated by s. 43 as a pre-vesting day liability, should be taken over by the board. It is a special case which in the absence of evidence to the contrary it must be assumed the calculation of net maintainable revenue took into account. Mr. Paull also relied on s. 48 of the Act of 1946 in which special provisions are made in respect of breaches of rights of support in cases where the right of action accrues after the appointed day. It provides that the board should take over liability notwithstanding the fact that apart from the section the colliery companies would be liable. There is no such provision with regard to the present subject and it should not, it is submitted, be implied. I think that this complicates, without solving, the problem. We have no information how this was fitted in to the terms of reference.

I have myself been troubled, though it was not relied on by the board, by the fact that, since the Workmen's Compensation (Coal Mines) Act, 1934, by law, and no doubt before that date in fact, over a large part of this field the liabilities to workmen were borne by insurance companies or compensation trusts, and did not fall as such on the year's profits. I would assume that what fell to be deducted in arriving at a figure of net maintainable revenue would be the premiums or payments to trusts. Was the potential liability to contribution covered by the policy in force at the date when the man was working for the former employer or at the date when he was certified as disabled? It might well, as it seems to me, be the former. If one assumes a mine closing down and the miners going to work in other mines, the potential liability for contributions might well be a liability "in respect of "the employment of workmen" at that time, that is, before the mine closed down: see s. 1 (*a*) of the Act of 1934. If so, it would or should have been covered by the policies in force at that time, the premiums for which will have been deducted in arriving at net maintainable revenue. If this is right, to decide in favour of the colliery company might be to relieve insurance companies or trusts of liabilities which they have received premiums or funds to cover.

Mr. Paull did not, as I understood him, take or press this point, and no evidence was put in as to the terms of policies. In these circumstances, I propose to disregard it. I have thought it right to refer to it because it brings out an uneasy feeling which I have had, namely, that in the absence of any evidence on this point and as to how the figures put before and accepted by the tribunal dealt with this problem, one may come to a conclusion which is not fair as between the two parties. However, each side could have tendered such evidence, so perhaps one should assume that there is nothing which could have assisted. Mr. Paull submitted that the onus was on the colliery company to show by evidence that the tribunal's award was on the basis that the right to contribution was extinguished. I was attracted by this argument at one time, but I have come to the conclusion that the argument for the colliery company prevails, having regard to the terms of reference. I have done my best to set out that argument, and I need not repeat it in detail. I think that the terms of reference on their natural construction lead to a figure for compensation which relieves the colliery company of liability to contribution in respect of diseases certified after the vesting day. It was said on behalf of the board that this amounted to a repeal of s. 43. I would not so express it. I can myself see no objection, if A took over B's mine, to an agreement, which might be express or implied, that as between A and B, A would not exercise the right of contribution which he would otherwise have. A fortiori the terms of a statutory transfer may be such as to produce the same result.

I therefore, though for different reasons, come to the conclusion that the county court judge was right and that the appeal should be dismissed.

I should add that the judge assessed the amount of the contribution which he would have found in the two cases if he had decided in favour of the board. The board appealed against his decision on this point, but after some discussion the point was abandoned. It does not in any event arise on the conclusion to which I have come. In my opinion, therefore, the appeal should be dismissed.

SINGLETON, L.J. Section 43 of the Workmen's Compensation Act, 1925, provides that a workman may recover compensation in respect of certain industrial diseases, of which miner's nystagmus is one. If the examining surgeon certifies that the workman is so suffering, and the disease is due to the nature of any employment in which the workman was employed at any time within twelve months previous to the date of the disablement, the right to compensation arises as if the disease were a personal injury by accident arising out of and in the course of that employment. The compensation is recoverable from the employer who last employed the workman during the said twelve months, in the employment to the nature of which the disease was due. For some ten months immediately before October 20, 1947, W. E. Davies was employed as a miner by the National Coal Board. On that date the examining surgeon certified that he was suffering from miner's nystagmus. The disease is due to the nature of his employment as a miner. He is entitled to compensation under the Act, and he has been paid compensation by the National Coal Board.

Section 43, sub-s. 1 (i) (iii) (*c*), proviso (iii), of the Act provides that if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as may, in default of agreement, be settled by arbitration.

Section 47 of the Act, and the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, made under that section, provide for the payment of compensation by employers in certain industries or processes involving exposure to dust, to workmen who are found to be suffering from pneumoconiosis.

On April 13, 1948, the medical board certified that John Jenkins was suffering from pneumoconiosis and suspended him from work in regard to all processes specified in para. 2 of the scheme. The scheme provides that if the workman has been employed in the industry for a period or periods amounting to not less than five years, the disease shall be presumed to be due to employment in the industry unless the employer proves the contrary. Jenkins had been employed in coal mining for many years, and for some fifteen months prior to the date of certification his employers were the National Coal Board, and they have paid him the compensation to which he was entitled. The scheme further provides that any other employers who employed the workman in the industry during the five years preceding the date of the injury (certification) shall . . . be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined by arbitration. Before the Coal Industry Nationalization Act, 1946, came into operation both Davies and Jenkins had been employed by the Amalgamated Anthracite Collieries Ld. On May 12, 1950, the National Coal Board instituted proceedings against the company claiming contribution in respect of the compensation paid to the two men. The claim was resisted by the company and the dispute came before His Honour Judge Trevor Morgan, K.C., at the Llanelly county court, for his decision. The judge on October 10, 1950, made an award in favour of the company, and from that award the National Coal Board appeal to this court.

The National Coal Board were established by the Act of 1946—an Act to establish public ownership and control of the coal mining industry and certain allied activities. The primary vesting date under the Act was January 1, 1947. Under s. 5, sub-s. 1, of the Act the assets described in Part I of Sch. I vested in the board on the primary vesting date. The later subsections made provision for the vesting of certain other assets in the board subject, in cases falling within Parts III and IV of Sch. I, to arbitration in the case of objection. Section 7 of the Act provided for the transfer of rights and liabilities under contracts mentioned in Sch. II to the extent therein mentioned. Section 9 provided that regulations should be made for ascertaining, verifying and recording particulars . . . of the assets, property and rights that vest in the board by virtue of s. 5 or s. 6 . . . and of contractual rights and liabilities so far as transferred to the board by virtue of s. 7.

The claim of the board is that the company are "other "employers" within the meaning of those words in s. 43 of the Workmen's Compensation Act, 1925, in the case of Davies, and within the meaning of the scheme made under s. 47 in the case of Jenkins. This is disputed by the company. It was said that the provisions as to "other employers" were meant to cover the case of the wandering workman, maybe a collier who worked sometimes at one pit and sometimes at another: none the less the provisions as to contribution would seem to be sufficiently wide to cover the case of one undertaking acquiring another: in such a case one would expect that the agreement would provide for the liability in respect of claims being made subsequently for contribution.

The words "other employers" must be given their ordinary meaning. If either of the workmen were asked in whose employment he was in the year 1946, the answer would be that he was employed by the Amalgamated Anthracite Collieries Ld.; and if he were asked by whom he was employed in 1947, the answer would be that he was then employed by the Coal Board. There was no uncertainty about that. Everyone—especially those engaged in coal mining—knew of the nationalization of the coal industry. Now these are two different bodies, the one a limited company and the other a board established by statute; they are in no sense the same; and it seems to me that the company must be regarded as "other employers". I do not derive help from s. 7 of the Act of 1946, nor from Sch. II, though it may be said that it would cover contracts by the week, or by the shift, between the company and colliers. No doubt there were at times difficulties in the way of workmen in certain industries leaving their employment, but we were not referred to anything which would have prevented any workman who did not wish to work for the Coal Board declining to do so. The men must be taken to have known the law which established public ownership and control of the coal mining industry, and that if they attended on January 1, 1947, their employers would be the Coal Board. In any event, they were paid by the Coal Board thereafter. It was only certain assets that were taken over by the Coal Board. For all one knows the company may have continued to carry on some of their activities, and there was no reason why a man should not have asked to remain with the company if he did not wish to work for the board. It must be assumed that he knew the difference.

The next point for consideration is whether it can be said that in some way the Act of 1946 wiped out the obligation of the "other employers" to pay contribution under the Act of 1925. It was submitted that the Nationalization Act of 1946 ought to be regarded as having repealed the provisions as to contribution in the Workmen's Compensation Act. I confess that I find this argument difficult to follow. The liability to make contributions is imposed on an employer by statute just as is the liability to pay compensation in respect of an accident arising out of, and in the course of, the employment. No one suggests that the liability to pay compensation in respect of an accident happening to a workman the day before the primary vesting day is affected by the Nationalization Act. The liability remains on the company though it (or the amount of compensation) may not be determined until months have elapsed. An industrial disease, such as those contracted by Davies and Jenkins, is the result of a gradual process, as the county court judge found. It is for that reason that the statute made provision for contribution. It is possible to imagine a case of certification within a very short time of change of employment. The question of industrial diseases and the liability arising therefrom has been a burning question in some industries for many years, and not least in the coal mining industry. If Parliament had intended by the Act of 1946 to repeal the provisions of the Workmen's Compensation Act as to contribution, it would have said so in clear terms. Moreover,

s. 7 and Sch. II concern only the transfer of certain rights and liabilities under contracts. The natural inference is that no liabilities other than those mentioned are taken over. There is no provision anywhere for the transfer of statutory liabilities.

The next question arises on the terms of reference. Mr. Paull submitted that we could not look at them and, alternatively, that they were not relevant to the issue. They are referred to in s. 10, sub-s. 3, of the Act—the compensation section—and we ought to look at them. Under sub-s. 3 the aggregate amount of compensation to be made in respect of the coal industry value of all the transferred interests "shall be a sum fixed, in "accordance with the terms of reference . . . by a tribunal " . . .". The most important parts of the terms of reference are paras. 3 and 4 (1). Under para. 3 the tribunal are to determine the global sum required to provide fair compensation to the owners of the assets described in Annex 1 for the transfer of those assets to public ownership, and for that purpose the tribunal are to ascertain the amount which the assets might be expected to realize if sold as one unit in the open market as assets of a going concern by a willing seller to a willing buyer on the basis of (a) the net annual maintainable revenue, that is to say, the net annual revenue which the assets as a whole might reasonably be expected to earn in the future, if they were not transferred to public ownership, and (b) the number of years' purchase to be applied thereto. Para. 4 provides that the tribunal shall have regard to all relevant circumstances, subject to certain express reservations which are not material for the purposes of this appeal. Thus it would be the duty of the tribunal to arrive at the gross annual revenue and then to deduct the necessary and proper expenses incurred in order to earn that revenue. Among the expenses would be payments by way of workmen's compensation. It is obvious that, to arrive at the global sum of fair compensation, a distinction must be drawn between a case in which all liabilities are taken over and a case in which the previous owner of the assets is left saddled with certain liabilities: so long as he had the going concern those liabilities could be discharged out of the revenue he earned, but if his assets are taken over and liabilities remain, the compensation ought to be more than it would be if both are taken over. That is axiomatic: any other view would not lead to fair compensation and would mean that regard was not had to all relevant circumstances.

The liability to pay compensation to workmen injured before the primary vesting day was not taken over by the Coal Board,

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and thus, apart from any question of insurance, this would be a liability to be considered by the tribunal; and so would be, I think, the potential liability to claims for contribution. This was a well-appreciated risk, especially in the South Wales coalfield.

It is now necessary to consider how questions of insurance affect the points at issue. In the ordinary business concern workmen's compensation risks would be covered by insurance, and the premiums paid year by year would be treated as a debit item in arriving at the net revenue. That is a simple case. There is more complication in the case of a concern whose workmen are subject to the risks envisaged by ss. 43 and 47 of the Workmen's Compensation Act, 1925, and I do not know in what way claims for contribution were covered or were dealt with. It may be that a successful claim for contribution was treated in just the same way as a successful claim for compensation, and that it was covered by the premium for that year. But what was the position if the concern went out of business and claims for contribution arose thereafter? The liability remained on the employers (apart from agreement in the case of the business being taken over), and unless they had covered this risk they would have to meet it. Further complications arise from the Workmen's Compensation (Coal Mines) Act, 1934 (5)—an Act to provide that the owners of coal mines in Great Britain shall insure against, or insure the discharge of, their liabilities under the Workmen's Compensation Act, 1925, etc.

Thus the Act of 1934 placed upon the company, as owners of a coal mine, the duty of covering all liability under the Act of 1925 in one or other of the ways prescribed. We have no information how they did this. It seems clear that the words of s. 1 of the Act of 1934 are wide enough to cover the liability to make contributions under ss. 43 or 47 of the Act of 1925. In the course of the argument I said, and I still feel, that we ought to have been given further facts. In the circumstances we must assume that the company carried out the duty placed upon it by s. 1 of the Act of 1934. And must we not also assume that they are covered by the premiums they have paid under (a) or by the payments they have made under (b)? It may be that under s. 7 of the Act of 1946 and Sch. II the Coal Board could secure to themselves the benefit of these arrangements. They cannot have it both ways, and probably it suits them better to adopt the course of seeking contribution from the former owners, leaving them to such rights as they have against their insurers or in respect of the compensation trust funds. I believe that the decision in this appeal depends on whether the former owners are "other employers" within the meaning of those words in s. 43 and in the scheme made under s. 47.

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(5) Workmen's Compensation (Coal Mines) Act, 1934, s. 1: ". . . "the owner of a coal mine shall not, "at any time, employ any workmen "for the purposes of the undertaking "carried on at that mine unless there "is in force either—(a) a contract of "insurance subscribed by an authorised insurer, being a contract "which . . . insures the owner "against all liability under the "principal Act in respect of the "employment of workmen by him ". . .; or (b) an instrument . . . "conforming with the requirements "of the schedule to this Act, for "securing, by means of a special "trust fund, the discharge of all the "owner's liability under the principal "Act in respect of the employment of "workmen as mentioned in paragraph "(a) of this subsection".

I agree that normally the net maintainable revenue can be ascertained without reference to the fact that there may be claims for contribution in the future. These may be covered by insurance, or that which has happened before is a guide. The tribunal had to determine the net maintainable revenue of the undertaking as a going concern. Once it ceases to be a going concern in the hands of the former owners they have no revenue out of which to pay accruing liabilities. They are left with liability to pay workmen's compensation in respect of past accidents, and to pay contribution in respect of subsequently certified industrial diseases within the specified periods. Herein lies the importance of the terms of reference as to (a) fair compensation in para. 3 and (b) that the tribunal shall have regard to all relevant circumstances in para. 4.

It was for the tribunal to consider these matters, and I presume that they would have before them the policies or compensation trusts, and that they would be able to form an opinion whether the owners were completely covered. (I am assuming that they took the view which I take as to "other owners".) The parties have not seen fit to give us this information. If the tribunal thought that the owners were covered against all such liabilities, by insurance or by the compensation trust funds, there was no need to consider this matter further. On the other hand, if the tribunal thought that there was some remaining liability on the former owners, they would be right in making allowance for it, not in arriving at the net maintainable revenue but as to what was fair compensation—perhaps as an element in considering the number of years' purchase to be applied.

Let me put it in another way. Contribution payments, which are payments within the industry, are not a relevant matter for consideration in arriving at the net maintainable revenue of the industry. The tribunal had to determine fair compensation to the industry for the taking over of its revenue-producing assets. First the net maintainable revenue had to be ascertained: that is only one stage. There must, as I have already pointed out, be a difference between the compensation awarded in a case in which both assets and liabilities are taken over and a case in which assets are taken over and liabilities (or some of them) left to be carried by the concern which is taken over. In assessing compensation the tribunal must have regard to the burden left upon the owners whose assets are acquired by the Coal Board. The company was left with a burden; so were other owners in regard to compensation and contribution. These matters must have been considered by the tribunal if, as I assume, the position as to running compensation in respect of past accidents and as to contribution was put before them. Everyone in the industry knew of the likelihood of claims for contribution in the case of a change of employers. We ought, therefore, to conclude that the tribunal gave consideration to such questions. It may be that they were of opinion that the former owners were sufficiently covered in one way or another, or it may be that they thought they were not, and so allowed something in arriving at fair compensation. We do not know; and the parties do not put before us material on which to consider it further. Clearly these were matters for the tribunal, and we must assume that they considered them and acted according to their terms of reference.

If my view upon this is right, the liability to contribution in respect of industrial diseases remains upon the former employers. I find nothing in the Act of 1946, or in the terms of reference, to give any indication that the contribution provisions of the Act of 1925 ought to be regarded as repealed. The real question for decision is whether the company, in the events which have happened, are "other employers" within the meaning of those words in s. 43 and in the scheme made under s. 47 of the Act of 1925. I have already stated that, in my view, they are; and for the reasons I have given I would allow the appeal.

DENNING, L.J. On January 1, 1947, the coal industry was nationalized. In consequence the National Coal Board became liable to pay workmen's compensation to those men who subsequently became disabled from industrial disease. In many cases the disease had been gradually progressing, unrecognized, for some time before the vesting date. On that account the board now claim from the former colliery owners a contribution towards the compensation which they have had to pay the men. They rely for this purpose on s. 43, sub-s. 1 (i) (iii) (*c*), proviso (iii), of the Workmen's Compensation Act, 1925.

I desire to say at once that, in my opinion, the National Coal Board cannot make out their case by reliance on s. 43, sub-s. 1 (i) (iii) (*c*), proviso (iii), alone. That section was passed in the year 1925 in order to enable the various employers in one industry to claim contribution from one another. It did not envisage a state of affairs whereby a whole industry became nationalized; and it did not therefore make any provision as to the right of a nationalized industry to claim contribution from the former owners. I am prepared to acknowledge that the words of s. 43, sub-s. 1 (i) (iii) (*c*), proviso (iii), taken literally, are wide enough to cover the situation; but nevertheless no one can possibly suppose that the Parliament of 1925 intended to legislate for this turn of events which they never had in mind at all. On all sound principles of interpretation, the enactment should be restricted to the circumstances contemplated by the Parliament of 1925, and should not be extended to this uncontemplated turn of events. If, therefore, the claim of the board to contribution is to be made good, it must, I think, be done by means of something in the Coal Industry Nationalization Act, 1946—something in it which expressly or impliedly brings s. 43, sub-s. 1 (i) (iii) (*c*), proviso (iii), into play in the nationalized industry. After all, it was the Parliament of 1946 which created the new situation, and it was that Parliament which should have provided for it. In my opinion, therefore, the solution of this case depends ultimately on the Act of 1946. Before I turn to it, I must, however, draw attention to some of the salient features of the Act of 1925 so as to see what effect the Act of 1946 had upon them.

The rights and liabilities of workman and employer under the Workmen's Compensation Act, 1925, depend entirely on there being in existence a contract of service between them: see s. 3 of the Act of 1925. If there is no contract of service, but only a contract for services, the Act does not apply. Nor does it apply if there is only a relationship created by statute, such as paupers in a workhouse or trainees in a government instructional centre. There must always be a contract of service. This is so fundamental that the provisions of the Act can be regarded almost as statutory provisions annexed to a contract of service.

One of the distinctive features of a contract of service is that it cannot be assigned on either side: neither the employer nor the workman can transfer the burden or benefit of it to anyone else. If the employer sells his business, the contracts of service of the workmen do not thereby become transferred to the purchaser. There is no relationship of employer and workman between the purchaser and the men unless and until the men enter into new contracts of service with the purchaser. Then, and then only, is there a new employer. If the sale of the business is unknown to the workmen—so that they do not then enter into new contracts of service with the purchaser—then the old contracts of service remain in existence, and the old employer remains their employer.

It follows inexorably that, when the Act draws a distinction between the same employer and any other employer, it must have contemplated not only that there was a different legal person owning the business in which the workman served, but also a different contract of service. On the one hand, of course, there are the cases where the workman himself leaves his old employer and goes to a new one, in which case it is obvious that there is always a new contract of service with the new employer. On the other hand, there are the cases where the employer sells his business to another, or his business is transferred by law to another as upon a dissolution or amalgamation. In those cases it is clear from *Nokes* v. *Doncaster Amalgamated Collieries Ld.* (6) that the workman does not, automatically on the sale or transfer, become under a contract of service with the purchaser or transferee. In *Nokes's* case (6) four months had elapsed since the dissolution of the employing company, and nevertheless it was held that the workman had not entered into, nor was he working under, a contract with the new owners. That means that there was not the relationship of employer and workman between them. Not until there was some new agreement, express or implied, between the workman and the new owners, would there be a contract of service between them. Not till then would there be a new employer. But after a new contract of service was made with the new owners, there would be a state of affairs in which the new owner became the new employer and the former owner became the previous employer. If, after the new contract was made, the man within the next twelve months succumbed to an industrial disease which had been developing for a long time, the new employer could claim contribution from the previous employer under s. 43 of the Act of 1925 unless the terms of sale expressly or impliedly excluded it.

(6) [1940] A. C. 1014.

Turning now to the Coal Industry Nationalization Act, 1946, one thing is clear: on the vesting date there were no new contracts of service made by agreement between the men and the board. All that happened was that the provisions of the old contracts of service—which had previously existed between the men and the colliery owners—were compulsorily and automatically transferred so as to apply thenceforward between the men and the board. Paragraph 2 of Sch. II to the Act of 1946 makes it clear that there was a statutory assignment of the benefits and burdens of these contracts from the colliery owners to the board. Neither men nor board were asked to agree to it. Neither of them at that moment had any choice in the matter. Whereas the common law, like a nursing mother, had refused to transfer contracts of service without the consent of those concerned, this statute came like a tyrant and said that they were to be transferred, whether they liked it or not. It was this statutory assignment which brought the Workmen's Compensation Act, 1925, immediately into play in the nationalized industry. It was nothing else that did it. There were not at that moment new contracts of service on which the workmen's compensation could operate afresh. There was only this statutory assignment of the old contracts. The effect of it, as between the men and the board, was that the board became liable to the workmen for all future accidents or diseases, that is, for all accidents that happened and all industrial diseases that were certified on or after the vesting date, the reason being that the contracts of service took effect for future purposes " as if the board had been " a party to the contract instead of the concern ", in which case, of course, the board would have been their employer and liable to pay the compensation payable under the Act of 1925. The assignment, however, left the colliery owner liable to the workman in respect of all past accidents and diseases: the reason being because the assignment only operated for the future, or, to use the words of the section, " so far as the performance thereof " is due under the contract on or after the primary vesting " date ".

So much is clear, but for present purposes it is important to see how this statutory assignment operates when it is necessary to work out the actual compensation payable by the board to the men under the Act of 1925. Suppose an accident takes place after the vesting date and it is necessary to ascertain a man's earnings " in the employment of the same employer " during the previous three years (s. 8) or during the previous twelve months "if he has been so long employed by the same employer" (s. 9). Is the man to be regarded as if he had been in the employment of the same employer all along, that is, the same employer after the vesting date as before? The answer is, I think, clearly Yes: because the Act of 1946 says that his contract of service takes effect as if the board had been a party to it instead of the colliery owner: in which case the board would have been the employer from the beginning. This gives a sensible result which the board's accountants themselves adopted in this very case. They took the man's earnings over the previous twelve months, which covered a period both before and after the vesting date, and calculated the compensation on that basis. That was, I think, quite right. It carries out the intention of Parliament, which plainly was that the workman should be no worse off, and no better off, by reason of the transfer than he was before (cf. s. 37 of the Act of 1946).

Again, suppose that a workman told the colliery owners when he entered their employment that he had not previously suffered from the industrial disease, whereas in fact he had, and after the vesting date he is overtaken by the self-same disease as he had previously denied: can the board take advantage of that representation so as to say that no compensation is payable? That depends on whether he is to be regarded as if he entered the employment of the board, not on the vesting date, but at the time when he entered the employment of the colliery owners (s. 43, sub-s. 1 (*b*)). I think it clear that he is to be so regarded, because the contract of service takes effect as if it had been made with the board: in which case he would have entered the employment of the board when he first made the contract with the colliery owners. This gives a just result and is in accordance with the settled rule that an assignee takes subject to equities and also has the benefit of them.

I realize that we are concerned today with the effect of the statutory assignment, not as between the men and the board, but as between the board and the colliery owners. But if I have rightly stated the effect of the statutory assignment as between the men and the board, it throws much light on its effect as between the board and the colliery owners, for if the colliery owners and the board are to be regarded as the same employer for the purposes of ss. 8 and 9 and s. 43, sub-s. 1 (iii) (*b*), of the Workmen's Compensation Act, 1925, so also they should be regarded as the same employer for the purposes of s. 43, sub-s. 1 (i) (iii) (*c*), proviso (iii). The board are the employers who employed the workman at the time when he was certified to be suffering from the disease. The colliery owners cannot be regarded as "any other employers", because the contract of service takes effect as if it had been made with the board; in which case the board would have been his employers ever since he started his contract of service at the colliery for the colliery owners.

That is sufficient to decide the case. I prefer, however, to put the matter on a broader ground. The effect of the statutory assignment by the Act of 1946 of the men's contracts of service was that the provisions of the Workmen's Compensation Act applied from January 1, 1947, as between the men and the board. But there is nothing in the Act of 1946 to make the provisions of the Workmen's Compensation Act apply as between the board and the former colliery owners. There is nothing whatever in the Act of 1946 to bring s. 43, sub-s. 1 (i) (iii) (*c*), proviso (iii), into play in the nationalized industry; and in the absence of any provision in that behalf, I am of opinion, as I said at the outset, that s. 43, sub-s. 1 (i) (iii) (*c*), proviso (iii), does not apply as between the board and the former colliery owners. In addition, there are two clear indications that it was not intended to apply between them.

Firstly, it was the duty of the colliery owners to insure against their liabilities to the workmen employed by them: see the Act of 1934. The benefits of those insurances pass to the board under Sch. II to the Act of 1946. I do not know whether those insurances cover liability for industrial diseases which develop after the vesting date, but if they do cover that liability, the board has the benefit of the insurance just as if they had taken out the policies themselves. They can therefore recover full indemnity from the insurance companies for their liability to the workmen; and the colliery companies can recover nothing. It is inconceivable that in those circumstances the board should recover contribution from the colliery owners.

Secondly, the terms of reference require the global sum payable to the colliery owners to be assessed according to the net annual revenue which the industry as a whole might be expected to earn if there had been no nationalization. The industry as a whole would have had to bear the whole of the workmen's compensation payable to the men who were struck down by industrial disease without getting any contribution from anybody. In assessing the global sum, therefore, the whole cost of the future workmen's compensation has already been debited against the industry as a whole; and it cannot be supposed that Parliament intended that an additional debit should afterwards be made against individual owners by way of contribution. I find myself in full agreement with all that Somervell, L.J., has said on this point.

My conclusion is that the board have no right of contribution from the former colliery owners, for the simple reason that the Act of 1946 does not give it, and that it is illegitimate for the board to revert back to the Act of 1925, which was passed for a different purpose altogether. I agree with Somervell, L.J., that the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *R. S. S. Allen; Herbert Oppenheimer, Nathan & Vandyk.*

A. W. G.

C. A.
1951
Jan. 29, 30, 31; *Feb.* 20.
Asquith and Birkett, L.JJ., and Danckwerts, J.

MONKLAND v. JACK BARCLAY LD.

[1948 M. 1445.]

Contract—Order for motor car from dealer—No requirement to purchaser to sign covenant not to resell within twelve months—Subsequent refusal by manufacturer to supply car unless covenant signed—Purchaser's refusal to sign—Position of dealer—Public policy.

The defendants, motor car dealers, agreed to sell to the plaintiff a new 4½ litre Bentley Mark VI car in May, 1946, a time when the British Motor Trade Association (to which all dealers and the great majority of manufacturers of cars in this country then belonged) had not yet promulgated their scheme requiring that their members should exact from any customer seeking to buy a new motor car a written and signed undertaking not to resell the car within six months of delivery. In August, 1946, the association promulgated that scheme, to which, in March, 1947, Bentleys Ld. adhered; and all manufacturers and dealers agreed to exact from any purchaser of a new motor car such an undertaking not to resell the car within six (subsequently twelve) months of delivery.

The contract for the sale of the new Bentley car was written on an order form, by condition 2 of which "the sellers will use their "best endeavours to secure delivery of the goods on the estimated "delivery dates from time to time furnished, but they do not guaran-"tee time of delivery, nor shall they be liable for any damages or

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"claim of any kind in respect of delay in delivery". On the front of the order form was the heading: "Estimated date of delivery "(subject to condition 2)", with a space for the date, which was never filled in. On March 28, 1947, the manufacturers of the Bentley car wrote to each customer, including the plaintiff, from whom retailers had received an order for a new car, that they would require the customer to sign the undertaking against resale. The defendants urged the plaintiff to sign the undertaking, but he refused on the ground that his contract was with the defendants, and that he was under no obligation by that contract to do so. On June 3, 1947, the defendants' managing director wrote to the plaintiff that the manufacturers had given him the following up-to-date information: "Mark VI Bentley . . . September/October, "1947".

The manufacturers appropriated no car to the plaintiff, and the defendants were unable to deliver one to him unless they delivered a car appropriated by the manufacturers to another customer. Had the defendants done so, they would have broken (1.) their agreement with the manufacturers, who then could have terminated it; (2.) their agreement with the British Motor Trade Association which then could have put them on the stop list, ruining them in a commercial sense; and (3.) also their agreement with their other customer (who had signed the undertaking) to whom the Bentley was appropriated by the manufacturers. On May 12, 1948, the plaintiff, not having had the car delivered to him, issued his writ against the defendants for breach of contract. The defendants pleaded (1.) that by the terms of their contract with the plaintiff, they were not liable for the delay in delivery; and (2.) that the contract to deliver to the plaintiff a new car without the condition attached that he should not resell it within twelve months of delivery was contrary to public policy and so void.

Held, (1.) that, since no estimated date of delivery had been furnished, the contract by the defendants was, as a matter of construction, to use their best endeavours to secure delivery of the car from the manufacturers within a reasonable time: see *per* Jenkins, L.J., in *Hartwells of Oxford Ld.* v. *British Motor Trade Association* [1951] 1 Ch. 50, and that, on the facts, a reasonable time had not expired at the date of the issue of the writ; (2.) that if the date furnished in the defendants' letter of June 3, 1947, was an estimated date of delivery "furnished" within the meaning of this formal contractual document, then the obligation on the defendants was to use their best endeavours to secure delivery from the manufacturers by September or October, 1947; (3.) that in either case, on the evidence in the case, the obligation of the defendants under the contract had been fulfilled; but (4.) that the contract to deliver the new car without the requirement that the purchaser should sign the undertaking was not contrary to public policy: public must be distinguished from political policy: see *Egerton* v. *Brownlow* (1853) 4 H. L. C. 1, 196.

Decision of Humphreys, J., [1950] W. N. 387; 66 (Pt. 2) T. L. R. 150, reversed.

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MONKLAND
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APPEAL from Humphreys, J.

During the period of the late war and up to January 1, 1946, sales of new motor cars were subject to government permit. The British Motor Trade Association, of which all dealers of cars in this country and all manufacturers of cars, except Rolls Royce Ld. and Bentleys Ld., were members, promulgated a scheme in mid-August, 1946, imposing on their members a requirement that they should exact from any customer seeking to buy a new motor car a written and signed covenant whereby he undertook not to resell that car within six months of purchase. Later the period was extended to twelve months—the material period in this case. Rolls Royce Ld. and Bentleys Ld. did not adhere to this scheme until March, 1947. There was, therefore, a period from January 1, 1946, to August 15, 1946, and in the case of Rolls Royce Ld. and Bentleys Ld. to March, 1947, spoken of as the "interregnum" when neither government permit nor requirement of covenant by the association was in force.

The plaintiff was an underwriting member of Lloyd's, who did not himself drive a car, and the defendants were retailers of Rolls Royce and Bentley cars under a written agreement with the manufacturers dated May 16, 1946, renewed from time to time. On May 22, 1946, during the interregnum, the plaintiff agreed to buy and the defendants to sell to him a 4½ litre Bentley Mark VI car. The contract was written on an order form, and by condition 2: "The sellers will use their best endeavours to secure "delivery of the goods on the estimated delivery dates from time "to time furnished, but they do not guarantee time of delivery, "nor shall they be liable for any damages or claim of any kind "in respect of delay in delivery". On the front of the order form was the heading: "Estimated date of delivery (subject to "condition 2)" with a space left blank for the date.

There was no term in the contract that the plaintiff should as a condition of obtaining delivery sign any covenant against resale. The estimated date of delivery was never filled in on the order form. By letter of June 3, 1947, Jack Barclay, a director of the defendants, wrote to the plaintiff "I have been "in touch with Messrs. Rolls Royce today and they give me "the following information which is as up to date as can be: "(1.) Mark VI Bentley . . . September/October, 1947". On March 28, 1947, the manufacturers wrote to each customer, including the plaintiff, from whom their retailers had received an order for a car, that they would require the customer to sign the covenant against resale. The plaintiff did not answer the letter, but took the point with the defendants that his contract was with them alone and that it contained no stipulation that he should enter into any such covenant; and he refused and continued to refuse to sign the covenant though Jack Barclay urged him to sign it and said that, if he did not do so, he would not sell him the car. The plaintiff was No. 64 on the defendants' list of customers.

In January, 1948, a Bentley Mark VI of the kind ordered by the plaintiff was delivered or appropriated by the manufacturers to the defendants with a direction that the car was to fill the order of customer No. 65, and No. 65 received the car. On May 12, 1948, the plaintiff, not having received the car he had ordered, issued his writ against the defendants for breach of contract, and he was awarded 1,500*l*. damages by Humphreys, J.

The defendants appealed.

Pritt, K.C., and *Guy T. Aldous* for the defendants.

The arguments appear succinctly stated in the judgment.

On the issue that at the relevant time the contract to deliver a new motor car without an undertaking by the purchaser not to resell within twelve months was contrary to public policy, counsel cited *Egerton* v. *Brownlow* (1), and the opinion therein of Pollock, C.B. (2), Lord Lyndhurst (3), Lord Truro (4), and Lord St. Leonards (5); and *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ld.* (6).

Ryder Richardson for the plaintiff .

On the issue as to public policy counsel cited *Jackson Stansfield & Sons* v. *Butterworth* (7); *Beresford* v. *Royal Insurance Co. Ld.* (8); *Dier's* case (9); *In re Bowman, Secular Society Ld.* v. *Bowman* (10).

Cur. adv. vult.

February 20. ASQUITH, L.J., read the judgment of the court.

This is an appeal by the defendants against a judgment of Humphreys, J., awarding the plaintiff 1,500*l*. damages for breach of contract in respect of the sale of a motor car. It is said to be a test case to which the motor trade attach much importance. It is therefore perhaps right to make some reference to the background against which it arises.

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(1) (1853) 4 H. L. C. 1.
(2) Ibid. 144, 151.
(3) Ibid. 160.
(4) Ibid. 195.
(5) Ibid. 237.
(6) [1894] A. C. 535.
(7) [1948] 2 All E. R. 558.
(8) [1938] A. C. 586.
(9) (1414) Y. B. 2 Hen. V, fol. 5, pl. 26.
(10) [1915] 2 Ch. 447, 470–1.

During the war and until the end of 1945 the sale of motor cars—of new cars at least—was controlled by government regulation. No new car could be sold without a permit. These administrative provisions were allowed to lapse at the end of 1945. There was a scramble for new cars, the demand for which vastly exceeded the supply, and in this scramble there joined speculators who desired cars not for their personal use, but for quick resale at a profit. This was thought undesirable by the British Motor Trade Association, of which all dealers in this country and all manufacturers, except Rolls Royce Ld. and Bentleys Ld., were members. Accordingly, in the middle of August, 1946, the Association promulgated a scheme imposing on its members a requirement that they should exact from any customer seeking to buy a new car a written and signed covenant whereby he undertook not to resell within a certain period after his purchase. This period was at first six months, and was later extended to twelve months, at which it stood at the material time in this case. Rolls Royce Ld. and Bentleys Ld., who may be treated as a single concern for the purposes of this case, did not, when the covenant scheme was launched by the Association in August, 1946, immediately adhere to it. They thought they could curb speculative buying by other means. But, by March, 1947, they had changed their minds and their policy. By a circular letter of March 14, 1947, Rolls Royce Ld. informed all their retailers that the latter must exact signature of the covenant from customers who had placed orders for any Rolls Royce or Bentley cars not yet delivered by March 15; and by a letter of March 28 they conveyed the same information direct to each customer from whom their retailers had received an order for a new car. These customers included the plaintiff.

Thus we may distinguish for the present purpose three periods: (1.) the war period, ending January 1, 1946, during which sales were subject to government permit; (2.) the so-called "interregnum", between January 1, 1946, and August 15, 1946, when the Association launched its scheme—a period during which no controls existed: in the case of Rolls Royce Ld. and Bentleys Ld. this period endured till March, 1947; and (3.) the period March, 1947, on, as from which Rolls Royce Ld. and Bentleys Ld., the companies which had stood out of this scheme, fell into line with it.

The plaintiff in this case is an underwriting member of Lloyd's. He himself does not drive a car, being unable, through an injured leg, to do so. The defendants are retailers, inter alia, of Rolls

Royce and Bentley cars, under a written agreement of May 16, 1946, renewed from time to time.

The managing director of the defendant company, one Jack Barclay, was, from at least 1944, a personal friend of the plaintiff. As far back as 1944 Jack Barclay had suggested to the plaintiff that, if and when the government permit system was relaxed, he should buy from the defendants two cars, a new Rolls Royce "Silver Wraith" and a new 4½ litre Bentley Mark VI, which he could, said Jack Barclay, almost certainly resell at a profit. He even said he would repurchase the cars himself if necessary. This project took shape and matured in a contract in the period which has been called the interregnum. With the Rolls Royce car we are not directly concerned. It is enough at this stage to say of it that, after a long wrangle as to whether the plaintiff should be required as a condition of its delivery to sign the covenant, in the end, in February, 1948, as the result of legal advice, it was delivered to him without that requirement being enforced.

It is with the Bentley car that we are directly concerned. Its history was different. It is common ground that, on May 22, 1946, the plaintiff agreed to buy and the defendants to sell him a 4½ litre Bentley Mark VI, that the contract was a written one, and that its terms are contained in an order form. While the existence of the contract is admitted, its terms and construction are in dispute. Nevertheless, it is clear that from end to end it contained no vestige of a term that the plaintiff should, as a condition of obtaining delivery, sign the so-called covenant or give any similar undertaking. However, when in March, 1947, Rolls Royce Ld. and Bentleys Ld. came into the covenant scheme, they conveyed very clearly by the letters I have mentioned to the plaintiff that he must sign the covenant and to the defendants that they must exact his signature, failing which the defendants would not be supplied with the car by Bentleys Ld. and, accordingly, the plaintiff would not be supplied with the car by the defendants. The plaintiff did not acknowledge Rolls Royce's letter of March 28, 1946, but took up the matter with Jack Barclay at some time after receiving this intimation. It is a reasonable inference that he took the point promptly. He refused to sign the covenant, and pointed out, with perfect truth, that his contract was with the defendants alone and contained no stipulation that he should do anything of the kind. Jack Barclay continued to urge him to sign it and the defendants made it clear to him, on paper, that he would be well advised to do so, and in conversation, that, if he did not, he would get no car.

The following passage from the evidence of the plaintiff, which on this point is uncontradicted, Jack Barclay not having been called, is significant. The plaintiff, having referred to the Rolls Royce letter of March 28, 1947, which had insisted on signature of the covenant by him, said he did not answer that letter. There then follows this: "Q.—Did you go and see anyone about "it? A.—Every time the question of the covenant cropped up, "I always told Jack Barclay it was not part of our contract and "I was not going to sign it. Q.—Did he say anything about "whether you would have to sign it before you got your motor "cars? A.—Yes; he told me I should never get them if I did "not".

So far as the Bentley is concerned, the plaintiff having persisted in his refusal to sign the covenant, Bentleys persisted in their refusal to deliver unless and until the covenant was signed, and the defendants continued to affirm their inability, failing its signature, to procure delivery of the car. This went on till the writ was issued on May 12, 1948. (We state these facts dogmatically at this stage, and will justify our statement later.)

The question is whether, in these circumstances, the defendants have broken or repudiated their contract. Before we come to its terms, we would venture on three general propositions which seem to us elementary, without being irrelevant.

(1.) Suppose A has contracted to sell to B unascertained goods by description—for example, "a" Bentley Mark VI (not "this" Bentley Mark VI), and suppose, further, that the seller expects to acquire the goods from a particular source, which may, indeed, be the only source available, the bare fact, without more, that when the time for delivery comes that source has dried up and that the seller cannot draw on it, does not absolve the seller. He is still, in the absence of some contractual term excusing him, liable for non-delivery: see, for instance *Hills and Another* v. *Sughrue* (11). (2.) It is equally clear that, when A sells subject to two conditions only, X and Y, he cannot, after the contract has been entered into, refuse performance unless and until an additional unstipulated condition Z, is fulfilled. If he so refuses, he is guilty of a wrongful repudiation. (3.) Nor, again, is a seller A absolved from delivering goods under a contract with B merely because to perform that contract would involve a breach by the seller of another contract between him and C—for instance, in this case a contract between the defendants and the Motor Trade Association. At first sight, if these propositions are sound, the defendants would appear, on the facts we have recited, to have been guilty of a breach or a repudiation of their contract.

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(11) (1846) 15 M. & W. 253.

The argument relied on by the defendants as repelling this conclusion can be ranged under two general heads: (a) they say that the terms of this particular contract, as to delay in delivery in particular, absolve them from liability in the events which happened; (b) alternatively, they say that, if the terms of the contract did not entitle them to act as they did, the contract was contrary to public policy and void.

Under head (a) we have first to ascertain what were the precise obligations as to delivery imposed by the contract on the seller, and secondly whether its obligations were discharged. Firstly, as to the nature of the obligation, if the contract had embodied an absolute obligation to deliver by a particular date, then the defendants would be liable if for any or no reason they exceeded the time limit. But in the present case there is no such absolute obligation. The order form embodying the terms of the contract has endorsed on it a number of conditions, of which condition 2, dealing with time for or delay in delivery, provides as follows: " The sellers will use their best endeavours " to secure delivery of the goods on the estimated delivery dates " from time to time furnished, but they do not guarantee time of " delivery, nor shall they be liable for any damages or claim of " any kind in respect of delay in delivery ". It is no longer argued, as it seems to have been below, that this clause entitled the sellers for any or no reason to withhold delivery indefinitely. It obviously binds the sellers to do something—in fact to use their best endeavours to secure delivery—to secure delivery presumably from the manufacturers, so that they themselves may make delivery to the customer. To secure delivery by the manufacturers, when? " On the estimated delivery dates from " time to time furnished."

The first way the argument is put by the defendants is that there were no estimated delivery dates. The heading " Estimated date of delivery (subject to condition 2)" appears on the front of the order form, but was left blank; and it is argued that the blank was never filled in by estimated dates furnished later. Hence the sellers are merely bound to use their best endeavours to secure delivery " within a reasonable time ". If so, a reasonable time means a time reasonable in all the circumstances. Such a time may be extended beyond its normal span by special circumstances, and these may include circumstances which did not exist at the time of the contract but which supervene later, hampering performance: see *Hick* v. *Raymond and Reid* (12). Just such a circumstance, so the argument runs, in the present case was Rolls Royce's and Bentley's belated adhesion, in March, 1947, to the covenant scheme, coupled with their persistence in this adhesion, and their refusal to supply cars ordered by persons who declined to sign the covenant—a refusal persisted in until, and indeed until long after, the issue of the writ on May 12, 1948. Hence, by the date of the writ the reasonable time for delivery had not expired and the defendants—the sellers—were not in default. This line of reasoning succeeded in the case, decided by this court, of *Hartwells of Oxford Ld.* v. *British Motor Trade Association* (13). However, the term as to time of delivery was in that case worded a little differently from that now involved. It read as follows: "The "seller will use his best endeavours to secure delivery of the "goods"—so far the clauses are the same—"on the date agreed, "but he shall not be liable for any damages or claim of any "kind, which may arise in case of delay". No date having ever in that case been agreed, Somervell, L.J., said that the clause was inoperative and the obligation was therefore one for delivery within a reasonable time. We consider that he would probably, however, have accepted the gloss placed on these words by Jenkins, L.J., in the same case, to the effect that, strictly speaking, the obligation of the seller was to use his best endeavours to secure delivery—namely delivery from the manufacturers—in a reasonable time. Such is one view of the obligation.

The other way the argument is put by the defendants is that a reasonable time does not come into the picture, since estimated delivery dates were in fact furnished in this case, not indeed in the space reserved for them in the order form constituting the contract, but later, by the letter of June 3, 1947, from Jack Barclay to the plaintiff. That letter, which is the defendants' answer to a letter from the plaintiff inquiring when he might expect delivery, begins: "I have been in touch with Messrs. "Rolls Royce today and they give me the following information, "which is as up to date as can be: (1.) Mark VI Bentley . . . "September/October, 1947". We doubt if this is a formal contractual document fulfilling the description in condition 2 of an "estimated date of delivery from time to time furnished". If we are wrong about this, the obligation on them was to use their best endeavours to secure delivery from the manufacturers by September or October, 1947.

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(12) [1893] A. C. 22.

(13) [1951] Ch. 50.

In our view it matters not which of these views of the nature of the obligation is right, because on either construction it was duly discharged. It is clear that Rolls Royce and Bentleys were determined as from March, 1947, to enforce signature of the covenant by those who had placed or should thereafter place orders for their cars. This is clear from their letters of March 14 and March 28. It is clear from the evidence quoted above that Jack Barclay, who was continuously in touch with the manufacturers, had sounded them and satisfied himself and told the plaintiff that the manufacturers were adamant on this point and that their position was "no covenant, no car". No endeavours used by the defendants, good, bad, indifferent, or "best", could budge them from this position. For this reason the defendants go on inquiring from the plaintiff whether he will sign and pressing him to do so, and the manufacturers go on reminding the defendants of this requirement.

In a letter of November 19, 1947, the plaintiff persists in his refusal, and by a letter of December 4, 1947, the defendants renew their pressure. Although these letters are written in reference to the Rolls Royce car and although this car was, on legal advice, in the end delivered without signature of a covenant, they indicate sufficiently the attitude in which, in relation to the Bentley car, the parties persisted to the end. By letter of March 8, 1948, the plaintiff threatens legal action in respect of the non-delivery of the Bentley. On March 12 the defendants write to Bentleys forwarding the plaintiff's letter and repeating that he refuses to sign the covenant. On April 30, 1948, Jack Barclay once more writes to the plaintiff: "As you know the "Bentley Company will not allocate a new car to any customer "where there is reason to believe that the purchaser would be "unwilling to sign the covenant before taking delivery. I think "the best way out of the difficulty would be for you to sign the "enclosed executory agreement, which means that you would be "willing to sign the covenant on delivery of your new car". The plaintiff remained obdurate and issued his writ on May 12, 1948.

In these circumstances it would seem that the defendants did use their best endeavours to secure delivery in a reasonable time or by September or October, 1947, whichever be the actual obligation resting on them. Mr. Ryder Richardson, for the plaintiff, argues the contrary, and bases his argument on four main grounds. The first is that the defendants did not "use "their best endeavours" in that they could have exercised, but did not exercise, against Bentleys the contractual rights to delivery of cars vested in them by the so called "retailer agree- "ment"—an agreement of May 15, 1946, renewed from year to year. The reference here is to cl. 9 of that agreement, which provides that the retailer (Jack Barclay Ld.) agrees to sell during the currency of the agreement a specified number of Bentley cars (in the first agreement fifty) and continues: "The retailer shall "notify the company in writing whenever he requires one of the "cars, whereupon the company will intimate to him the price". Clause 22, so far as it is material, reads: "The purchase price "of each chassis or car shall be paid at the office of the company "in London prior to delivery, or in any event not later than seven "days after the receipt by the retailer of advice that the chassis "or the car is ready for delivery and requiring payment thereon". Clause 23 starts: "On receipt of such advice given in accordance "with the foregoing clause the property in any car or chassis "shall be deemed to have passed to the retailer".

Clauses 34 and 44 are important. Clause 34 is: "The retailer "shall forthwith become and continue to be throughout the "currency of this agreement a member in good standing of the "Motor Trade Association and shall faithfully observe all the "objects, regulations, bye-laws and rules of the Association as "may from time to time be in force". Pausing there, there is some uncertainty as to when precisely the rules of the Association embodying the covenant scheme were published, but the enforcement of that scheme was proclaimed to be one of its objects on or about August 15, 1946. Clause 44 says: "If the "retailer shall . . . (ii) commit or suffer any breach of any of "the terms of this agreement on his part to be observed and "performed . . . (vii) act so as to cause or suffer his name to "appear on the stop list of the Motor Trade Association" it is to be lawful, but not obligatory, on the company to determine the appointment of the retailer and of the contract as to all or any of the chassis or cars covered thereby. The clause proceeds: "On the termination under this clause of the contract for sale "of any chassis the company shall cease to be under any obliga- "tion to deliver the same". To this may be added the following passage from cl. 20: "If before delivery of any new Bentley "chassis or car the company shall have reason to believe that "the retailer . . . has violated or proposes to violate any of the "terms of this contract . . . it shall be lawful for the company ". . . to cancel the sale of such chassis or car, and it shall not "be incumbent on them to disclose the source of their information".

If, therefore, the defendants had tried to exercise, as it is said they should have, their rights to delivery of a car in favour of a customer of theirs who refused to sign the covenant, they would be violating cl. 34 of their contract with Bentleys, and Bentleys could have terminated that contract in whole or refused to deliver the particular car involved by virtue of cl. 44, and they could have done this, by virtue of cl. 20, even if they had merely had reason to think that the defendants contemplated any such violation.

This first point taken by Mr. Ryder Richardson is therefore, in our view, untenable.

The second point is that a letter from Bentleys of January 14, 1948, negatives the proposition that the defendants had used their best endeavours to secure delivery and shows, on the contrary, that they were at that time obstructing or retarding such delivery. The letter, so far as material, is as follows: "With regard to G. E. Monkland, order reference B.2383"—that is the order number of the Bentley car—"we understand "that as this gentleman is shortly taking delivery of a Rolls "Royce model you do not wish him to have early delivery of the "Bentley he has on order". It is suggested that the letter is evidence of some inducement applied by someone on behalf of the defendants to someone in Bentleys to delay delivery to the plaintiff.

Leaving aside the point that neither the writer nor anyone else was called to prove that inducement and that the letter is not per se evidence of any facts alleged in it, there must be some misunderstanding here on the part of the writer. It is quite true that a Rolls Royce was to be delivered to the plaintiff. It is not true that this was the reason why delivery to him of the Bentley was to be refused or delayed at anyone's instance. In our view the letter records a muddled and distorted impression of the fact that the defendants had been telling Bentleys that the plaintiff would not sign the covenant and that, if and so long as he persisted in his refusal and Bentleys in their insistence, the plaintiff would have to go down to the bottom of the queue until one or other of them changed his mind. On this view only does the letter accord with the rest of the evidence.

Mr. Richardson's third point is that the defendants did not use their best endeavours to secure delivery because a Bentley car of the kind ordered by the plaintiff was in January, 1948, delivered or appropriated to them, and that, although Bentleys accompanied this allocation with a direction that the car was to fill the order of Mr. Brutton, the defendants were not bound by this direction and acquired an unfettered property in the car, which they ought to have delivered or appropriated to the plaintiff. I should observe that the plaintiff was No. 64 on the defendants' list of customers and Mr. Brutton was No. 65.

If the defendants had acted in the manner in which it is suggested that they were bound to, they could only have done so by dishonestly pretending to Bentleys that the car, which Bentleys had intended to go to Brutton and delivered or appropriated to the defendants on that understanding, was in fact going to Brutton, whereas, they knew and intended it to go to the plaintiff, a non-covenantor. Such conduct, tainted, as it seems to us, with fraud, is surely not required in fulfilment of an obligation to " use their best endeavours to obtain delivery ". It would, incidentally, have been a breach, firstly, of the defendants' retailers' agreement, which Bentleys could have terminated, secondly, of their agreement with the Motor Trade Association which could, and no doubt would, have put them on the stop list, thereby killing them stone dead in a commercial sense, and, thirdly, of their agreement with Brutton. We therefore think that this point also is invalid.

Fourthly and lastly, it is said that the express obligation to use their best endeavours to secure delivery for the plaintiff of his car implied an obligation not to secure delivery to customers out of rotation. They should be supplied in the order in which they had placed their orders with the defendants. No doubt if all the customers had signed or undertaken to sign the covenant some such term might conceivably be implied. But where some are covenantors and others, non-covenantors, the " best endeavours " on the part of the defendants could not, in the events which happened, secure delivery to the latter in their due priority, or indeed at all, so long as the manufacturers continued to insist that the deliveree must be a covenantor. We are therefore of opinion that there was no breach by the defendants of their obligation to use their best endeavours to secure delivery.

Mr. Pritt, therefore, for the defendants does not need his second point, namely that a contract to deliver to a customer, without the condition attached that he should covenant not to resell, would have been contrary to public policy, and that, if the contract between the defendants and the plaintiff contained no such restrictive condition, it was void. It is strictly unnecessary to decide this point, but since this case may go further and our view on the first point may prove mistaken, we will record our view on the second.

Certain specific classes of contracts have been ruled by authority to be contrary to the policy of the law, which is, of course, not the same thing as the policy of the government, whatever its complexion—for example, marriage brokerage contracts, contracts for the sale of honours, contracts in unreasonable restraint of trade and so on. The courts have again and again said that, where a contract does not fit into one or other of these pigeon holes, but lies outside this charmed circle, the courts should use extreme reserve in holding such a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest: see, for example, the language of the House of Lords in *Fender* v. *St. John-Mildmay* (14).

The present contract does not seem to us to fit into any of the traditional pigeon holes. The suggestion, in particular, that this contract is in restraint of trade because it does not include a condition fettering resale savours of paradox. The policy of the law still leans towards free trade. We are, in effect, asked to extend the doctrine to a class of contracts at present outside it. Are these contracts incontestably opposed to the public interest? The merits of the covenant scheme and the alleged disadvantages of not enforcing it do not seem to us in the least incontestable. Two schools of thought might well exist about its merits, and may well, for all we know, do so.

One further point was argued. It was suggested by Mr. Pritt that the Motor Trade Association's covenant scheme had the approval of the Government or government officials and that this was in some way relevant to the question whether a contract which departed from it was or was not contrary to public policy. It could only be so relevant if the Government's approval was some evidence that public policy called for the enforcement of the scheme.

We think that this is an unfounded suggestion. What one Government approves, its predecessor or successor may condemn; and, if the suggestion were acted on, precisely the same contract

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(14) [1938] A. C. 1.

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might have to be held void when Government A was in power, and valid when Government B was in power. The distinction between political policy and public policy was firmly drawn in *Egerton* v. *Brownlow* (15), where Lord Truro said (16) that public policy "has been confounded with what may be called "political policy; such as whether it is politically wise to have "a sinking fund or a paper circulation, or the degree and nature "of interference with foreign states; with all which, as applied "to the present subject, it has nothing whatever to do".

For these reasons, in our view, the defendants' point on public policy is wholly unfounded; but on the other point, the appeal is entitled to succeed.

Appeal allowed.

Solicitors: *Osmond, Bard & Westbrook; Booth & Blackwell.*

C. G. M.

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(15) (1853) 4 H. L. C. 1.

(16) Ibid. 196.

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Cohen, Asquith and Birkett, L.JJ.

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[1949 C. 1410.]

Master and servant—Negligence—Various contractors working at airport—Service of lorries operated by one for own workmen—Drivers forbidden to carry employees of others—Prohibition ignored—Ostensible authority—Contractor's liability.

A number of contractors were engaged in work at an airport. One of them, the defendant company, instituted a kind of omnibus service within the perimeter of the airport by means of their own motor lorries. Each of their drivers was expressly prohibited by the defendant company from giving a lift to anyone other than their own employees. The plaintiff, a workman employed only by another contractor at the airport, hailed one of the defendant company's lorries and was taken on the lorry as a passenger by the driver. When alighting from the lorry, the plaintiff was injured by the negligence of the driver.

In an action brought by the plaintiff against the defendant company in respect of his personal injuries, evidence was given that it was not unusual for lifts to be given by drivers of the lorries of the defendant company to workmen employed by other contractors at the airport. The trial judge found: (1.) that the driver of the

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lorry when he took the plaintiff as a passenger did not know that the plaintiff was employed by a contractor other than the defendant company, and also (2.) that it was not proved that the defendant company, as distinguished from their driver, knew of any practice by the defendant company's drivers of giving lifts to workmen not employed by the defendant company.

It was contended for the plaintiff that the driver of the defendant company had an ostensible, as apart from an actual, authority to carry workmen working at the airport, whether or not they were employed by the defendant company, and that the company must have known of the practice of drivers of the defendant company giving lifts to men employed by other contractors: they must have known that such a practice was likely to grow up or must inevitably grow up.

Held, that the plaintiff when on the lorry was, as against the defendant company, a trespasser, for he was not riding on the lorry at the invitation or with the licence, actual or constructive, of the defendant company. The contention of the plaintiff as to the knowledge of the defendant company could not be sustained in view of the findings by the trial judge that it was not shown that the defendant company had any knowledge of the practice by the drivers of the defendants' lorries of giving lifts to workmen not employed by the company.

Per Asquith, L.J. The act of the driver in giving a lift to the plaintiff was outside the scope of his employment. It was not merely a wrongful mode of performing an act of the class which the driver was employed to perform, but was the performance of an act which he was not employed to perform.

Twine v. *Bean's Express Ld.* (1946) 62 T. L. R. 458 followed.

Decision of Sellers, J., affirmed.

APPEAL from Sellers, J.

The defendant company were, in 1948, contractors at Heath Row Airport, where they employed a large number of workmen. Within the perimeter of the airfield they instituted a kind of omnibus service by means of motor lorries, designed for carrying materials, driven by their own men. Each driver received clear oral instructions from the transport department of the company that the men they were to carry must be the company's employees, and no others. In the cab of each lorry was a notice in these terms: "The driver of this vehicle has strict orders to "carry no passengers other than the employees of George "Wimpey & Co. Ld. during the course of or in connexion with "their employment. Any other person travelling on this vehicle "does so at his own risk". On the side of each vehicle was the word "Wimpey" in very large letters.

Notwithstanding the prohibitions, it became not unusual for men working at the airfield for contractors other than the company to be given a lift on the company's motor lorries. Four of the company's employees gave evidence before Sellers, J., that they knew of this practice, but they were not members of the company's transport department. There was no way, beyond interrogation, by which a driver could ascertain whether a man who hailed his lorry was employed by the company, if he did not recognize him as such.

On May 1, 1948, the plaintiff hailed one of these open motor lorries, and the driver stopped and allowed him to mount. The plaintiff was employed at the airfield by contractors other than the defendants. After travelling a short distance, the plaintiff, when alighting from the lorry, sustained an injury as a result of which one of his legs had to be amputated below the knee.

The plaintiff brought his action against the company only, claiming that they were responsible for negligence which resulted in his injury. By his statement of claim he alleged that he was on the lorry at the invitation of the company; and, when asked for particulars of the invitation, he answered that it consisted of that given by the driver of the lorry. At the trial before Sellers, J., and a jury the jury found that the driver of the lorry, who was not a party, was negligent, but that the plaintiff was guilty of contributory negligence to the extent of 50 per cent. Accordingly they halved the damages assessed. The issue of the company's liability was, by consent, reserved for the decision of Sellers, J., sitting without a jury.

Sellers, J., found (1.) that the plaintiff did not know that he had no right to obtain a lift on the lorry, i.e., he did not know of the prohibitions; (2.) that the company's drivers generally did not knowingly carry men who were not the company's servants; and (3.) that the driver of this lorry did not know that the plaintiff was employed by contractors other than the company; and (4.) that it was not suggested and certainly not established that the company knew that men other than their own were using the lorries in that way, a finding which, as pointed out by Asquith, L.J., must, owing to finding (3.), refer to the knowledge of the company themselves, as distinct from their driver.

Sellers, J., also was reported as saying: "The argument was "that the company ought to have known what was happening "and that the plaintiff and others like him would use the lorries, "and that therefore the company owed a duty to these persons "as those who might reasonably be anticipated by them as likely "to be injured by the negligent driving of their servant: *Bourhill* "v. *Young* (1). Such considerations are relevant in considering "the duty and obligation of the driver of the vehicle, but in my "view they are not relevant in considering the responsibility of "the defendants". The judge decided that it was outside the scope of the driver's employment to give the plaintiff a lift, and, following *Twine* v. *Bean's Express Ld.* (2) he held that the company were not liable.

The plaintiff appealed.

C. N. Shawcross, K.C., *S. Seuffert* and *O. J. V. Kitson* for the plaintiff. The fact that the plaintiff thought that he had a right to obtain a lift on this lorry is admittedly not material; but if the defendants, being a company, so acted by their servants that the plaintiff thought that he had a right to obtain the lift, that would be another matter. If, as regards the defendants, the plaintiff was a trespasser, that would conclude this case. But the plaintiff was not a trespasser. The driver of the lorry, as the judge found, did not know that the plaintiff was employed by contractors other than the defendants. It was within the ostensible authority, as apart from the actual authority of that driver, to offer the plaintiff a lift: see *Pearson* v. *Lambeth Borough Council* (3). The plaintiff, therefore, was a licensee of the defendants when on the lorry, the ostensible authority being to carry men employed by any contractor on the aerodrome. The practice had grown up, as witnesses employed by the defendants testified, of carrying on the defendants' lorries workmen employed by other contractors on the aerodrome, and the defendants, apparently, had done nothing to stop this practice. The defendants are estopped from relying on the actual limits of the driver's authority. The defendants either knew or must be deemed to have known of this practice and to have acquiesced in it. No witness was called in a managerial capacity, and the plaintiff is entitled to rely on the knowledge to be imputed to the defendants of this practice.

The driver of this lorry in giving a lift to the plaintiff was acting within the scope of his authority. As is stated in Salmond on the Law of Torts (10th ed.), at p. 94, in comment on *Uxbridge Permanent Benefit Building Society* v. *Pickard* (4), "It is not within the actual authority of a clerk to commit fraud, "but it is within his ostensible authority and so long as he is "acting within the scope of his ostensible authority the

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(1) [1943] A. C. 92.
(2) (1946) 62 T. L. R. 458.
(3) [1950] 2 K. B. 353.
(4) [1939] 2 K. B. 248.

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"employer will be bound whether he" (the clerk) "is acting "for his own purposes or for his employer's purposes". See also the observations of Lord Thankerton in the Privy Council in *Canadian Pacific Railway Co.* v. *Lockhart* (5). As Winfield writes in his Textbook on the Law of Tort (5th ed.), at p. 126: "The act done may still be in the course of employment even "if it was expressly forbidden, by the master"; and he cites *Limpus* v. *London General Omnibus Co.* (6). The driver here was not indulging in a "frolic of his own". The driver himself said in evidence that, had he known that the plaintiff was not employed by the defendants, he would not have driven him. See also the observations of Greene, M.R., on ostensible authority in *Uxbridge Permanent Benefit Building Society* v. *Pickard* (7).

Humfrey Edmunds for the defendants. This case is concluded by the decision in *Twine* v. *Bean's Express Ld.* (8). The only issue is whether the plaintiff when on this lorry was a trespasser or a licensee.

[Asquith, L.J. The fact that the plaintiff did not know that he was a trespasser is immaterial on the question whether he was a trespasser.]

The driver was hailed and then simply stopped, and the plaintiff got into the lorry; and the judge has found that the driver did not know that the plaintiff was not employed by the defendants. The question is: had the driver actual authority to give the plaintiff a lift?

[Asquith, L.J. We need not trouble you on that issue.]

Then had he ostensible authority to take the plaintiff on the lorry as a passenger? Lastly, had the defendants given the plaintiff a direct licence to travel on their lorry? But the last two points are not raised here on the pleadings. If the plaintiff is relying on the second point, that the driver had ostensible authority to invite the plaintiff on to the lorry, that is a reliance on the doctrine of estoppel and must be pleaded.

There was no reply or amendment of the statement of claim. As to the issue of ostensible authority, the driver's job was to drive and to carry men—a specific class of men. To carry may be said to include a number of acts. If you hold up your hand to a chauffeur and he stops and you enter the motor car, the chauffeur has not allowed or invited you to enter the motor car. You, the passenger, have merely claimed a right to enter it.

(5) [1942] A. C. 591, 599.
(6) (1862) 1 H. & C. 526.
(7) [1939] 2 K. B. 248, 253–4.
(8) 62 T. L. R. 458.

The driver in this case could not give the plaintiff, when he hailed the lorry, any right to get on to it. The driver had a duty to prevent unauthorized passengers from riding on the lorry, and, if he could do it, to prevent a person like the plaintiff from getting on to it. The mere fact that he failed to do this was not an invitation to the plaintiff to travel on the lorry.

The sphere of the driver's employment was to drive the lorry with a load of the defendants' men and to stop for men whom he honestly believed to be employed by the defendants. His other duty was to stop men from getting on to the lorry who were not employed by the defendants. The plaintiff here has to justify his presence on the defendants' lorry. If he fails to do so, he is a trespasser. No one ever asked him to get up on to it: he merely stopped it and climbed on to it. Compare the case of a trespasser on land. If you enter my land, you do so at your peril: there is no duty on a landlord to warn one who wishes to enter that he must keep off his land. If a garden gate is left open and a man who is not an invitee or a licensee enters my grounds, he is a trespasser. The simple fact is that the plaintiff became aware that other people were filching rides on the defendants' lorries and that he did so on this lorry. It is suggested that the driver was under an obligation to the plaintiff to tell him that he was not to trespass. But the relationship between the driver and the plaintiff was not that of master and servant or of parent and child, and it has not been suggested that the lorry was an allurement. A trespasser has been defined by Lord Dunedin as one "who goes on the land "without invitation of any sort and whose presence is either "unknown to the proprietor or, if known, is practically objected "to": see *Addie & Sons (Collieries) Ld.* v. *Dumbreck* (9). But the judge here found that the driver did not know that the plaintiff was not employed by the defendants. Therefore his presence as a trespasser was not known to either the defendants or the driver, their servant.

The plaintiff here fails in limine on his third point that, by their conduct, the defendants had given him a direct licence to travel on their lorry. He so fails by reason of the finding of the judge that the defendants did not know that men not employed by them were in the habit of using their lorries in this way. The plaintiff has failed to discharge the onus that is on him of proving that he was not a trespasser. If he desires to

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(9) [1929] A. C. 358, 371.

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rely on any invitation on the part of the driver, although he has not pleaded this, then he has not proved any invitation on the part of the driver.

Kitson in reply. Of the three cases put by Lord Thankerton in *Canadian Pacific Railway Co.* v. *Lockhart* (10) this is the third: "Where the servant is doing some work which he "is appointed to do, but does it in a way which his master "has not authorized and would not have authorized, had he "known of it. In these cases the master is, nevertheless, "responsible". Rigby, L.J., in *Dyer* v. *Munday* (11) cites a passage in the judgment of Willes, J., in *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (12): "A person who puts "another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances "that arise, when an act of that class is to be done, and trusts "him for the manner in which it is done; and consequently, he "is held answerable for the wrong of the person so entrusted "either in the manner of doing such an act, or in doing such an "act under circumstances in which it ought not to have been "done; provided that, what was done, was done, not from any "caprice of the servant, but in the course of the employment". Rigby, L.J., said in the earlier case: "'scope of authority' has "exactly the same meaning as the expression 'course of employ- "'ment', and the act complained of must be done in the course "of the employment of the person doing it, though it may be "beyond any authority actually given to him".

COHEN, L.J. I will ask Asquith, L.J., to deliver the first judgment.

ASQUITH, L.J. The judge at the trial, Sellers, J., decided that it was outside the scope of the driver's employment to give the plaintiff this lift, and that the defendants were not liable. He reinforced this conclusion by praying in aid the authority of the Court of Appeal in *Twine* v. *Bean's Express Ld.* (13). The headnote of that case is as follows: "The husband of the plaintiff "was employed in the savings bank department of the Post "Office, and the defendants were contractors employed by the "Post Office in general work as carriers. The drivers of the "defendants' vans were authorized to carry certain classes of "persons as passengers on the vans but were otherwise forbidden "to carry passengers. The plaintiff's husband was not one of

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(10) [1942] A. C. 591, 600.
(11) [1895] 1 Q. B. 742, 748.
(12) L. R. 7 C. P. 415, 420.
(13) 62 T. L. R. 458.

"the persons whom the drivers were authorized to carry. On "the material date the plaintiff's husband by permission of the "driver, but without the knowledge or consent of the defendants, "was riding on a van of the defendants when the van collided "with an omnibus and he was killed. *Held*, that in carrying the "deceased man as a passenger the defendants' driver was acting "outside the scope of his employment; that the deceased man at "the time of the accident was a trespasser on the van; that the "defendants had not been guilty of any breach of duty towards "him; and that the claim therefore failed".

It appears to me that the only difference between that case and the present which is material, or might be material, is that in *Twine's* case (13) the plaintiff not merely was a trespasser in fact, but knew he was a trespasser. I will revert to this point. Lord Greene, M.R., in his judgment, said: "That being so, it "seems to me there is an end of the matter, because if the "question is asked: Was the driver, in giving a lift to the "deceased man, acting within the scope of his employment? "the answer is clearly, No. He was doing something which he "had no right whatsoever to do, and qua the deceased man he "was as much on a frolic of his own as if he had been driving "somewhere on some amusement of his own quite unauthorized "by his employers".

Mr. Shawcross managed to detect four features distinguishing that case from the present. Some of these distinguishing features belong to a part of the argument (that based on ostensible authority) which I am not considering at the moment, but, as I have said, there was one distinction which might be material to the present phase of the argument, viz., that in *Twine's* case (13) the plaintiff was informed by the driver himself that he (the plaintiff) had no right to travel on the car, whereas in the present case the plaintiff was not told that, although in fact he had no such right. The plaintiff in *Twine's* case (13) was not only a trespasser de facto, but he never imagined he was anything else. I am not sure that Mr. Shawcross's argument did not at times assume that he could not, in fact, be a trespasser unless he knew he was one. Of course, that assumption is unfounded in law.

It was conceded by counsel for the plaintiff that if the plaintiff was, at the material time, in fact a trespasser, he could not recover. No doubt he had the permission of the driver to come on board, but for him to recover against the defendants, as distinct from the driver, it must appear that he was riding on the lorry

(13) 62 T. L. R. 458.

at the invitation or with the licence, actual or constructive, of the defendants themselves. If he was as against them a trespasser, then whatever his rights against the driver he could no more recover from the defendants than could the plaintiff in *Twine's* case (13). It is elementary that if A, professedly acting on behalf of B, purports to give me leave to enter on B's land, and A has no actual authority to do so, I am a trespasser if I act on this permission: none the less so, because I do not know of A's want of authority. So here there can be no sort of doubt that the driver had no authority to give any such permission; he was, in fact, peremptorily forbidden to do so in the plainest terms. The plaintiff, on getting on to the lorry, was prima facie a trespasser, and to displace this awkward conclusion plaintiff's counsel has had to resort to a number of contentions which are incidentally, in my view, none of them covered by the pleadings, because on the pleadings, although the plaintiff alleged an invitation by the defendant company, he was asked for particulars of such invitation, and the only particulars he gave consisted in the driver's invitation itself.

I think that these unpleaded contentions on which the plaintiff is forced to rely really amount to this, that although the driver acted in excess of his actual authority the defendants had invested him with an apparent authority in excess of his actual authority. The actual authority was admittedly to carry the defendants' men alone; the apparent authority was to carry men generally, or rather to carry men who were working on the aerodrome whether employed by the defendants or not. They had caused, or allowed it to appear, so the argument runs, to people like the plaintiff that he and his like had their permission to travel on their lorries, and in these circumstances the defendants must be treated as having impliedly licensed the plaintiff's act in accepting a lift, or, to be exact, are estopped from relying on the actual limits of the driver's authority.

The steps by which this result is reached must logically, I think, be the following, if it is to be reached at all:—first, there has to be shown knowledge by the defendants that their lorry drivers had made a practice of disregarding the prohibition; secondly, acquiescence by the defendants in that practice; and, thirdly, acquiescence in such a manner as to represent to people like the plaintiff, and indeed the plaintiff himself, that the driver's authority was not limited to carrying the defendants' men.

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(13) 62 T. L. R. 458.

I cannot see how the plaintiff can get over the first of these three hurdles, not to mention the second and the third, for the judge has expressly found, and there was evidence, in my view, on which he could so find, that it had not been established that the defendants knew that their driver, or drivers, gave lifts to unauthorized persons. To this awkward finding two answers, I think, were attempted. First, it was said that this finding applies only to actual, and not to imputed, knowledge, and that as four of the defendants' employees gave evidence that they knew of the practice, the defendants must be treated as having known of it. I do not consider that the knowledge of these men, who had nothing to do with the defendants' transport department, but were engaged, I think, as concrete mixers, can be properly imputed to the defendants, and the point, if not abandoned, was certainly not pressed. The second answer was that the defendants must have known, given that their lorries plied within the limits of the site and that workmen working for several different contractors were there, that a practice of this kind was likely to grow up, or must inevitably grow up, and, that being so, they must be taken to have known that it did grow up; but when there is a clear finding supported by evidence that they did not know (or that there was no evidence that they knew), how can it be said that they *must* have known? The finding is that they did not know. I do not see how that contention can be substantiated. Unless, at all events, knowledge by the defendants is proved, the whole of this argument based on ostensible authority fails in limine.

There was a certain vagueness in this branch of the argument and it may have been suggested that, quite apart from any permission given to or act done by the driver, the defendants made some direct representation to the plaintiff or people of his kidney that they had the defendants' leave to mount their lorries. I cannot see what act on the part of the defendants can be relied upon as having that operation. I am accordingly of opinion that the plaintiff never ceased to be, in fact, a trespasser, and that the case is directly covered by *Twine's* case (13). If that is right, it is sufficient to dispose of the appeal.

But the case was also argued from a different angle of approach —that of scope of employment. The two approaches, of course, overlap or interlock to some extent. As was pointed out, I think, in *Twine's* case by Uthwatt, J., sitting as an additional judge of the King's Bench Division, in the court of first instance (14), it was "outside the scope of the driver's employment" in that case "for him to bring within the class of persons to whom the "duty to take care was owed by the employer, a man to whom "contrary to his instructions he gave a lift". Those words seem to me directly in point here. To put it differently, I should hold that taking men not employed by the defendants on to the vehicle was not merely a wrongful mode of performing the act of the class this driver was employed to perform, but was the performance of an act of a class which he was not employed to perform at all. In other words, the act was outside the scope of his employment for the same reason that the act complained of in *Twine's* case (15) was held to be outside the scope of that driver's employment. I am not unaware that a prohibition has been held in some cases not to curtail the scope of employment as in *Limpus* v. *London General Omnibus Co.* (16), but I think it does so in this case. However, on the view I take of this case, it is unnecessary really to decide whether this second ground is valid or was established.

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(13) 62 T. L. R. 458.

(14) (1945) 62 T. L. R. 155

We have had the utmost assistance from counsel on both sides. If I have come to the wrong conclusion on this by no means simple case, I have no one but myself to blame. For myself, I would dismiss the appeal.

BIRKETT, L.J. I agree.

COHEN, L.J. I agree, and I only want to add a word on one point. My brother Asquith, in the course of the argument, referred to a passage in the judgment of Sellers, J., which he said (and I agree entirely with him) was somewhat difficult to follow. It was in these terms: "The argument was that the "company ought to have known what was happening and that "the plaintiff and others like him would use the lorries and that, "therefore, the company owed a duty to these persons as those "who might reasonably be anticipated by them as likely to be "injured by the negligent driving of their servant: *Bourhill* v. "*Young* (17). Such considerations are relevant in considering "the duty and obligation of the driver of the vehicle, but in my "view they are not relevant in considering the responsibility of "the defendants".

Mr. Shawcross said, and there is a great deal to be said for it, that if the argument was as stated, it did concern and have

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(15) 62 T. L. R. 458.
(16) (1862) 1 H. & C. 526.
(17) [1943] A. C. 92.

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Cohen, L.J.

something to do with the responsibility of the defendants. I think, however, that the reporting must have gone wrong because, when one looks at *Bourhill* v. *Young* (17), one sees quite clearly that the judge was quite right in saying that *Bourhill* v. *Young* (17) had nothing whatever to do with the question of the responsibility of the defendants. In *Bourhill* v. *Young* (17) the only question at issue was whether a motor-cyclist, or rather his executors since he himself had been killed in the accident, could be held responsible to a lady who had had the misfortune to hear the noise of his collision with a motor car whilst standing on a stationary tramway car forty-five feet from the point of impact, and as a result suffered fright and sustained severe nervous shock and the premature birth of a child—whether she could recover damages from the executors of the motor-cyclist. The question whether the employer of the motor-cyclist might be responsible for any damage for which the motor-cyclist was responsible did not arise. That is, I think, what the judge must have meant when he said that the argument had nothing to do with the responsibility of the defendants.

For the reasons that my Lord has given, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *J. H. Milner & Son; Stanley & Co.*

C. G. M.

(17) [1943] A. C. 92.

WROTTESLEY *v.* REGENT STREET FLORIDA RESTAURANT.

1951
Jan. 30;
Feb. 13.

Lord Goddard, C.J., Humphreys, Hilbery, Pritchard and Devlin, JJ.

Master and servant — Wages — Remuneration — Catering industry — Unlicensed restaurant—Waiters receiving as wages from employer less than the prescribed statutory minimum remuneration—Weekly share-out of tips-pool in custody of employer—Total weekly sum received in excess of statutory minimum remuneration—Whether offence committed—Catering Wages Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 24) *—Wages Regulation* (*Unlicensed Place of Refreshment*) *Order,* 1949 (*S.I.* 1949, *No.* 433).

The waiters employed at an unlicensed restaurant, by an oral agreement between the waiters themselves and between them and their employers, paid into a pool all tips received by them during the course of their employment. The tips were placed in a locked

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

box, to which the head waiter kept the key. The contents of the box were distributed weekly in shares calculated in accordance with the agreement.

The total weekly sum received by each waiter, including his share of the tips and his weekly wage from his employers, exceeded, but the weekly wage paid by the employers was itself less than, the minimum wage prescribed by the Wages Regulations (Unlicensed Place of Refreshment) Order, 1949. The proprietors of the restaurant having been prosecuted for failing to pay the minimum wage required by that order:—

Held, that the sums paid from the pool were not remuneration paid to the waiters by the employers, for the tips never became the property of the employers, since a customer who tipped a waiter had no intention of giving the employer anything; and therefore that, notwithstanding that the total sum received by the waiters in a week exceeded the prescribed minimum, the employers were guilty of contravening the Order of 1949, it being immaterial that the amount received in tips had to be taken into account in computing a waiter's earnings for income-tax purposes.

CASE STATED by a Metropolitan magistrate sitting at Marylebone.

Four informations were preferred against the defendants, by each of which it was alleged of them, that, being employers of workers to whom the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949, applied, they, at their premises in Regent Street, London, unlawfully failed to pay remuneration not less than the statutory minimum remuneration to four of their workers, whose names were specified.

On the hearing of the informations the following facts were proved or admitted:—The Florida Restaurant carried on by the defendant company was unlicensed. The four workers in question, to whom the Order of 1949 applied, were waiters employed at the restaurant. It was agreed orally between the waiters and the company that all sums which the waiters received as tips should be paid over to the company, who would each week pay the waiters as remuneration 30*s*. (in one case 2*l*.), and in addition the proportion of the total amount of all the tips receivable by them.

The waiters placed the tips received in a locked box provided by the company. In the pay weeks to which the informations related each of the four waiters received from the company a wage of 30*s*. (in the one case 2*l*.). In addition there was distributed to each waiter a proportion of the total amount of tips in the box, the proportion to each waiter amounting to some 4*l*. 10*s*. (more in the one case).

The head waiter, on behalf of the other waiters, kept the key of the box. At the close of business each day he opened the box in their presence and counted the contents, the amount of which was entered in a book. The money remained in the box until the weekly share-out, in which all, except the one, participated equally. Regard was had to the tips as forming part of the waiters' emoluments for the purposes of income tax.

The prosecution contended that each of the four waiters had been paid in the week in question less than the minimum wage as laid down by the Wages Regulation Order of 1949—the alleged deficiency being the difference between the sum laid down by the Order and the 30*s*. (in one case more) paid as wages by the company—for all that was received in cash from the company by the waiters in the week in question was 30*s*. (in one case more) since the tips given by the customers never became the property of the company and therefore they were not received by the waiters from the company.

The defendant company contended that the Act of 1943 referred to remuneration not wages; that the Act did not differentiate between wages and tips, but prescribed that the remuneration of a worker in the course of his employment should not fall short of a prescribed minimum; that the remuneration, that was, wages plus a share of the tronc which each of the four waiters had received in the week in question, exceeded the statutory minimum remuneration, which remuneration was obtained from the company in the course of their employment.

The magistrate dismissed the informations since he was of the opinion that the Act of 1943 would have referred to tips had the legislature intended that tips were not to be regarded as part of a waiter's remuneration, and that, where tipping was recognized, part of the wages of the staff came from the customers, and where there was an agreed method of distribution of tips the waiter's share of them was part of his remuneration; that, provided that the total remuneration, that was, wages paid by the restaurant plus tips, exceeded the statutory minimum it did not matter for the purposes of the Act of 1943 or of the Order of 1949 in what proportion it was made up from those two sources; and that payment of tips was remuneration for the purpose of compliance with the Act of 1943.

The prosecutor appealed.

Sir Hartley Shawcross, A.-G., and *Rodger Winn* for the prosecutor. The question to be determined is whether tips received by waiters in the course of their employment, and which are paid into a pool to be distributed weekly in specified shares, in pursuance of an agreement between the waiters and between them and their employer, form part of the waiters' remuneration within the meaning of the Catering Wages Act, 1943.

The policy of the Act is to fix a minimum wage for persons employed in the catering industry, and tips cannot be considered as wages. It is plain that the word "remuneration" which is found in the Act means wages: see s. 8, sub-s. 1 (*a*); s. 10, sub-s. 2.

Such an agreement as the present might take one of two forms: either the employer became custodian or trustee of the pool or tronc for the waiters, or the property in the moneys in the tronc passed to the employer, who distributed it as his own money.

It is plain on the facts of the present case that the employer was no more than custodian of the tronc for the waiters, and that the tronc never became the property of the employer. Certainly, a customer who tips a waiter intends that the property in the tip shall vest in the waiter: he does not intend to give anything to the employer, and there is no other circumstance in the present case to indicate that the property in the tips passed from the waiters to their employer.

By s. 9, sub-s. 2, of the Act the employer is required to "pay" to the employee the statutory minimum remuneration. A does not pay anything to B merely by identifying and appropriating a portion of a sum of money which already is the property of B jointly with others. Accordingly, where, as in the present case, the total weekly sum received by a waiter, minus the share of the tronc to which he is entitled, falls short of the minimum remuneration required by the Order of 1949, the employer has failed to comply with its provisions.

Even if the agreement were that a waiter should voluntarily pay over all tips to the employer, the tips thereby becoming the property of the employer, their subsequent distribution could not form part of the waiter's remuneration within the meaning of the Act. The property in the tips would first of all vest in the waiter; and then, by paying them over to the employer, the waiter would have incurred a "necessary expenditure" within the meaning of s. 10, sub-s. 1, of the Act. By that section any necessary expenditure must be taken into account in computing the statutory minimum remuneration of an employee, and consequently, on the facts of the present case, the remuneration paid by the employer to the waiters falls far short of the statutory minimum.

Salmon, *K.C.*, and *Lester* for the defendants. The policy of the Catering Wages Act, 1943, is to protect the employee: it is not aimed at penalizing the employer. It is of significance that both the Act of 1943 and the relevant Order of 1949 refer to remuneration rather than wages. It is submitted that remuneration has a wider connotation than wages, and includes all moneys received by an employee by reason of his employment. If the Act had intended that tips should not form part of a waiter's remuneration it would have expressly so provided.

Provided that the employee receives in the course of his employment a weekly sum at least equivalent to the minimum statutory remuneration the requirements of the Act are satisfied. The Act is concerned with providing that a minimum weekly sum shall be received by the employee, and provided that that minimum sum is received it is of no consequence whether it originates from tips or from moneys paid out of the coffers of the employer.

Further, there was evidence in the present case from which the magistrate could legitimately draw the inference that the agreement between employer and employed was that all tips received by the waiters during the course of their employment should be paid over to and become the property of the employer. The intention of the customer when giving the tip is not conclusive of the matter, and in this respect it is somewhat analogous to the situation where a person pays a secret commission to another's servant: the donor does not intend to benefit the master, nevertheless the master is entitled to that which his servant has so received. The words "necessary expenditure" which are found in s. 10, sub-s. 1, of the Act refer to such an outlay as the providing of a uniform; they cannot apply to anything which forms part of the employee's remuneration.

Sir Hartley Shawcross, *A.-G.*, replied.

Cur. adv. vult.

February 13. LORD GODDARD, C.J., read the following judgment of the court:—When the case was first before this court last December, realizing that it raised a question of great importance to the whole catering trade and that no appeal lies from this court, we directed that the case should be heard before a full court of five judges. [His Lordship referred to the case stated and to the findings of the magistrate, and continued:] There was no notice in the restaurant referring to tips or the manner in which they would be disposed of or distributed. In our opinion it is clear, though perhaps not precisely stated, that the magistrate meant to find that the waiters were engaged on the terms that they received a certain weekly sum from the defendant company and a share of the tips, or, as it is generally called among waiters, the tronc. As is well known, the tronc system is one under which the customers' tips are pooled and shared out between the waiters and, in some cases, perhaps, also other members of the staff. That this was his meaning is, we think, put beyond doubt by his finding that, where tipping is recognized, part of the wages of the staff comes from the customers, and where there is an agreed method of distribution of tips the worker's share of them is part of his remuneration. He then found that, provided the total remuneration, that is, wages paid out of the coffers of the restaurant plus tips, exceeds the statutory minimum, it does not matter for the purposes of the Catering Wages Act, 1943, or the Order, in what proportion it is made up from these two sources. In other words, the magistrate held that, provided the waiter receives from one source or another an amount of money not less than the statutory minimum, no offence had been committed.

It is, we think, clear that the magistrate was largely influenced by the fact that, both for the purpose of calculating the earnings of a waiter in connexion with the Workmen's Compensation Acts, and for computing his profits or gains for assessment of income tax, tips have to be taken into account, but in our opinion this is really an irrelevant consideration. The amount of a man's earnings in an employment and the amount of remuneration which his employer pays to him are not necessarily the same thing. The section creating the offence, and under which the proceedings are taken, is s. 9, sub-s. 2, of the Catering Wages Act, 1943. That section provides that, if an employer fails to pay to a worker to whom a wages regulation order applies remuneration not less than the statutory minimum remuneration clear of all deductions, he shall be guilty of an offence. Section 10 contains somewhat elaborate provisions for the computation of remuneration. Not only the short title but the structure of the Act—setting up a wages commission, permitting the establishment of wages boards, and providing for wage regulation

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orders—clearly indicates that it is with wages that the Act is intended to deal. The use of the word "remuneration" in both s. 9 and s. 10 and, indeed, in other sections, is probably because there are certain deductions from wages which are authorized by s. 10, so that remuneration is an apt word to indicate the net payment.

What we have to decide is whether, when a waiter receives a payment from the tronc in the manner found in the case, that sum can be regarded as remuneration paid to him by, or as remuneration obtained by him in cash from, his employer. In our opinion, when a customer gives a tip to a waiter the money becomes the property of the latter. The customer has no intention of giving anything to the employer. Mr. Salmon, indeed, did not contend that in a case where no tronc existed, a tip given by a customer could be regarded as remuneration paid by or obtained from the employer. But where the tronc system obtains the money given by the customer is paid into a tronc or pool by the waiter so that it then becomes the joint property of all those entitled to share in the pool. In parenthesis, it may be seen by reference to a French dictionary, that the word tronc is applied to a box or receptacle for money, and can be used to indicate, for instance, a poor box.

It seems to us that there is no ground for saying that these tips ever became the property of the employers. Even if the box were kept in the actual custody of the employer he would have no title to the money: the position would be exactly the same as if the owner of some bank notes and coin put them in a bag and handed it to some person to keep for him. When the tronc money is shared out the waiters are dividing up their own money. Accordingly, we hold that the sums received from the tronc by the waiters cannot be taken into account in computing the amounts paid by the respondents to them.

Whether, in view of this judgment, the company have any possible answer is a matter for the magistrate to determine, as we remit the case to him with the opinion of the court that there was a case to answer.

The appeal is allowed with costs.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Health and National Service; J. Mayorcas.*

Applied. TRAVIS *v.* MINISTER OF LOCAL GOVERNMENT AND PLANNING [1951] 2 K. B. 956

Affirmed. H.L. [1952] 1 All E.R. 509.

C. A.

1951
Mar. 19, 20;
Apr. 13.

Somervell, Singleton and Denning, L.JJ.

EARL FITZWILLIAM'S WENTWORTH ESTATES CO. LD. *v.* MINISTER OF TOWN AND COUNTRY PLANNING AND ANOTHER.

Town and country planning—Compulsory purchase order—Land ripe for development—Proposed sale of building site—Price exceeding existing use value—Proposed purchaser to pay development charge—Assignment to him of compensation for loss of development value—Land acquired by Central Land Board for benefit of purchaser—Policy of Board—Validity of order—Acquisition of Land (Authorization Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sch. I, para.* 15—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 43, *sub-ss.* 1 *and* 2—*Town and Country Planning* (*Development Charge*) *Regulations,* 1948 (*S.I.* 1948, *No.* 1189), *reg.* 2; *Sch., para.* 1.

By s. 43 of the Town and Country Planning Act, 1947, the Central Land Board may, with the approval of the Minister of Town and Country Planning, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of the Act, and, in particular, may so acquire any land for the purpose of disposing of it for development for which permission had been granted under Part III of the Act on terms inclusive of any development charge payable under those provisions in respect of that development. By sub-s. 2 the Minister is empowered to authorize the board to acquire the land compulsorily if he is satisfied that it is expedient in the public interest that the board should do so, and that they are unable to acquire the land by agreement on reasonable terms. By the "following provisions" of the Act the functions of the board include that of ascertaining development values and of fixing and collecting development charges.

The owners of a large estate refused to lease a plot of land on which to build a house except for a term of 300 years at a rent of 20*l.* 10*s.* 0*d.* a year, and subject to the condition that the tenant should pay the development charge in return for having assigned to him the landowners' claim for compensation for loss of development value. The applicant for a lease refused these terms, and, having obtained from the local authority a permit to build, applied to the Central Land Board for assistance. The local planning authority having intimated that, in their opinion, the land in question should be immediately available for building, the board, being unable to come to an agreement with the landowners for the sale of the land at its existing use value, made an order under s. 43, sub-s. 2, for the compulsory purchase of the plot. After an inquiry into the landowners' objection the Minister confirmed the order.

The landowners thereupon applied under para. 15 of Sch. I to the Acquisition of Land (Authorization Procedure) Act, 1946, to have the order and the confirmation by the Minister quashed, on the ground that it was invalid, as not having been made for any purpose connected with the board's functions under the Act, but for the purpose of enforcing the board's policy of sales at existing use values.

Birkett, J., dismissed the application. He held that the board had not made their order only for the purpose of enforcing their policy of sales at existing use values, and that they had power under the second limb of s. 43, sub-s. 1 (beginning with the words "in particular") to make the compulsory purchase order for the purpose of assisting in the accomplishment of the desired development, and that, the Minister having certified as to its expediency, the order was valid. On appeal by the landowners:—

Held (*per* Somervell and Singleton, L.JJ.), that the exercise by the board of their powers of compulsory purchase in the instant case under s. 43, sub-s. 1, was in connexion with their functions as the authority operating the development charge scheme, and that their order, having been affirmed by the Minister, was accordingly valid.

Per Singleton, L.J. The words in s. 43, sub-s. 1, "may acquire "land for a purpose connected with the performance of their func-"tions", are wide enough to cover a case in which the board think it right to acquire land in order to enable them to collect the development charge, though they may only do this if the Minister approves. I cannot accept the argument that the sole purpose of s. 43, sub-ss. 1 and 2, was to enable the board to test the market or to find out by dealing in land themselves what was the value of developed land. Though the main purpose of the board may well have been to induce landowners in general, and the company in particular, to adopt one of the methods of sale favoured by the board, the case is not one in which it can be said that powers were exercised for a purpose differing from those specified in the statute: the powers were used to enable the board to carry out its function of collecting development charges.

Per Denning, L.J. (dissenting). The dominant purpose of the board was not to assist in their proper function of collecting the development charge, but to enforce their policy of sales at existing use value only. The dominant purpose being unlawful, the order was invalid, and could not be cured by saying that there was also some other purpose which was lawful. The board and the Minister had misunderstood the extent of their compulsory powers, and their affidavits showed that they had overlooked that their ultimate purpose in exercising their powers should be connected with the performance of the board's functions under the Act. The policy of sales at existing use values only might be an excellent policy and one to be encouraged by economic means, but, once the board proclaimed that they would use their compulsory powers to enforce it, it ceased to be a policy and became a law, laid down by a government department and not by Parliament. A general rule of conduct of that description, so enforced, was legislation and nothing else, and, as such, was invalid. If a government department, however well-intentioned, took upon itself the functions of Parliament and sought to legislate, it was the duty of the court to intervene.

Decision of Birkett, J., [1951] 1 K. B. 203 affirmed.

C. A.

1951

EARL FITZWILLIAM'S WENTWORTH ESTATES CO. LD. *v.* MINISTER OF TOWN AND COUNTRY PLANNING.

APPEAL from Birkett, J. (1).

In August, 1948, one Rodgers approached the surveyors of the appellant company, Earl Fitzwilliam's Wentworth Estates Co., which owns large estates in Ecclesfield, Sheffield, for a lease of a plot of land on which to build a house. He was offered a lease for 300 years at an annual rent of 20*l.* 10*s.* 0*d.*, inclusive of the assignment of the benefit of the company's claim in respect of the development value of this plot on the three hundred million pounds compensation fund under the Town and Country Planning Act, 1947, but that he would have to pay the development charge.

On August 16, 1948, Rodgers obtained permission under Pt. III of the Town and Country Planning Act of 1947 to build a house on the plot of land, and on October 7 his architect wrote to the Central Land Board a letter stating: " As the land agent " does not propose to lease this land to my client at present use " value, will you please make a compulsory purchase order or " lease for the benefit of my client. I presume that I shall be " informed of your present use value and have the opportunity of " agreeing to the price before the purchase or lease is com- " pleted ". That was followed by a letter on November 1, 1948, from the Central Land Board to the company's surveyors, pointing out that the terms offered to Mr. Rodgers appeared to approximate to the level of prices obtained for similar land in the neighbourhood before the Act of 1947 came into operation, and enclosing a circular entitled " House I ", containing " Advice " on . . . selling a site for building a house ", one of the three alternative courses of which it was suggested the company should adopt.

On November 5 the company's surveyors replied to the Central Land Board: " We are instructed that our client is " not disposed to adopt any of the alternatives set out in the " document referred to ". The board, being informed by the local authority that in their opinion it was in the public interest that the land in question should be made available for housing development, and being unable to acquire by agreement the land on (in the board's opinion) reasonable terms, on July 22, 1949, made an order compulsorily to acquire it " for the purpose of " disposing of it for development . . . on terms inclusive of any " development charge payable in respect of such development ".

The company objected to the order, but, after a public inquiry by an official of the Ministry of Town and Country Planning, the Minister confirmed it.

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(1) [1951] 1 K. B. 203.

The company, by the present proceedings, applied under para. 15 of Sch. I to the Acquisition of Land (Authorization Procedure) Act, 1946, to have the compulsory purchase order and the Minister's confirmation order quashed.

On July 31, 1950, Birkett, J., dismissed the company's application. He was of opinion that the board were not entitled to exercise the power of compulsory purchase merely for the purpose of enforcing their policy that land should only be sold at a price based on existing use value, but he thought that the evidence did not establish that the board had made their order for that purpose only. He held that the board had power under the second part of s. 43, sub-s. 1, to make the compulsory purchase order for the purpose of assisting in the accomplishment of the desired development, and that the Minister having certified to its expediency, it was valid.

The company appealed.

Sir David Maxwell Fyfe, K.C., and *Richard Davidson* for the applicant company. The board in making their order were influenced by extraneous matters, which they were not authorized by s. 43 of the Act to take into consideration. By the first limb of sub-s. 1 the board's power to acquire land is limited to purposes connected with their functions; and the second limb, following the words "and in particular", is merely giving an example of those purposes and is not intended to add to the powers of the board. The functions of the board are to assess and collect the development charge and not to encourage and promote development. That is a matter for the local authorities. What the board are here seeking to do is to enforce their declared policy of sales of land at existing use value only, and to prevent landowners from making it a condition of sale that the purchaser should buy the right to a share in the compensation fund. They are imposing a sanction on those who do not conform to that policy. That is a purpose outside the functions of the board under the Act and is ultra vires. The confirmation of the order by the Minister cannot give vires where vires do not exist. If it had been intended to give the board the unlimited powers which are claimed Parliament could easily have done so. Since the Railways Clauses Act there appears to have been no instance of any Minister, local authority or statutory undertaker being given powers of compulsory purchase otherwise than in connexion with their functions.

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If the second limb of sub-s. 1 of s. 43 is to be said to create a separate function of the board, that is a back-door method of introducing a special function, especially one which gives such wide and general powers. In any case, it does not fit in with the scheme of the Act. By s. 64, sub-s. 2, of the Act the right to share in the compensation fund is made transmissible by assignment or by operation of law as personal property.

[*Sydney Municipal Council* v. *Campbell* (2) referred to.]

Sir Hartley Shawcross, A.-G., and *J. P. Ashworth* for the Minister and the Central Land Board. The scheme of this legislation in this particular context is to secure for the community development values. In connexion with that object the Town and Country Planning (Development Charges) Regulations, 1948, are material. They provided in terms that the governing principle on which the Central Land Board were to act in determining the development charge was to secure that land could be freely bought and sold at existing use value. That is material in explaining the functions of the board. The object was to encourage development. Whilst it is true that the effect of the Act is to restrict development not in accordance with town planning, its object is to encourage development in accordance with town planning. Provisions were put into the statute to secure not only that development value should be secured for the State but that development should take place. The first function of the board is to assess and collect development charges and thereby to liquidate the State liability to compensate. One method of effecting that purpose is by compulsory purchase and the other by development charges. Section 43 concerns sites ad hoc which have not been designated in a plan, and there is nothing in the Act to authorize compulsory purchase for the purpose of re-sale except s. 43. The purchase of land for the purpose of testing the market is one of the functions of the board. The correct construction of the second part of sub-s. 1 is that it is an express statement by definition that the acquiring of land and disposing of it on terms inclusive of any development charge is within the functions of the board. It is unqualified. "In "particular" introduces what is not only a separate limb but an independent limb. Section 64, sub-s. 2, permits transmission of the right to compensation. That is essential in order to promote what is the general principle of the Act, viz., that land should change hands at its existing use value.

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(2) [1925] A. C. 338.

The whole operation is to separate the land from the right to compensation for it. Assuming that the particular power is at any rate by definition a function, or connected with a function of the board, the question is whether the present exercise is within the power of the board. To ask why the board are exercising this power is to confuse the motive or reason for using the power with the power itself. Why the landlords wanted to sell this land at a price which included the development charge is immaterial. It is not for the court to question the occasion if the exercise of the power is valid.

[*Point of Ayr Collieries Ld.* v. *Lloyd George* (3) referred to.]

Cur. adv. vult.

April 13. The following judgments were read:—

SOMERVELL, L.J. The applicant company moved to quash a compulsory purchase order made by the Central Land Board and a confirmation of that order made by the Minister of Town and Country Planning, under s. 43 of the Town and Country Planning Act, 1947 (hereinafter called the Act), on the ground, in substance, that it was ultra vires. The learned judge dismissed the application, and the company appeal. The compulsory purchase order was in respect of a small plot of land, 1,960 square yards, in Whirlow Lane in Sheffield, the property of the company.

In order to make the issue intelligible it is necessary to outline the broad effect and scheme of the Act. I will deal first with its effect on land which had potential development value on the appointed day, July 1, 1948. There are special provisions (s. 80) with regard to land which was ripe for development on that day, with which we are not concerned. I will consider a plot of land which on the appointed day was being used for some agricultural purpose. If restricted to that, its existing user, it was worth 250*l.* It is a plot which had potential value over and above this as a future site for a house or houses. Its value, assuming that this right could be freely exercised, or perhaps rather exercised subject to such restrictions as existed prior to the passing of the Act, would be 750*l.* The Act provided (s. 12) that after the appointed day permission was required for any development as defined by the Act, which of course included the building of a house. If, in course of time, the owner wished to build a house, he had in addition to getting permission to pay a development charge (s. 69).

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(3) [1943] 2 All E. R. 546.

A body called the Central Land Board (hereinafter called the board) were set up (s. 2), who exercised their functions on behalf of the Crown (s. 3, sub-s. 3). The board were not concerned with the granting of permission to develop but were concerned, inter alia, with the assessment and collection of the development charge (s. 70). In determining the amount of the development charge the board were to have regard to the difference between the value of the plot with permission to build a house and the value of the plot with no such permission, that is, restricted to existing user (s. 70, sub-s. 2). If one assumes that agricultural values had remained unchanged the latter figure in my example would be 250*l*. As the land was ex hypothesi not ripe for development on the appointed day, but has become so at the time being considered, the value of the plot with permission to build might be 900*l*. Section 70, sub-s. 3, provides for the making of regulations as to the general principles to be followed by the board in determining the amount of the development charge. I shall have to come back to these, but it is sufficient at the moment to say that the regulations provide that in ordinary cases the development charge shall be the full amount of the difference as above stated, to which the board are to have regard. On the figures put this would be 650*l*. The broad effect of this is that the State, through the Central Land Board, as and when development takes place collects " development values ". These development values may, and at present will, normally, as in the case put, have existed in part on the appointed day as the property of the then owners. As years go on land may of course be developed which had on the appointed day no development value. Its development will, of course, be subject to the same conditions.

The broad effect of this, in the case put, is that the owner, assuming he remains the owner, has lost what he had on the appointed day, namely, the development value worth 500*l*. and its subsequent increment. The Act does not purport to provide for compensation on the basis of the market value to be ascertained of all development values as on the appointed day. It provides that payments may be made under a scheme in respect of interests in land which are depreciated in value by the provisions of the Act, the aggregate amount of the payments for England, Scotland and Wales to be 300,000,000*l*. (s. 58, sub-ss. 1 and 2). Claims are to be made to and dealt with by the board under the scheme. There was no evidence before us as to what proportion of his 500*l*.

depreciation the notional owner would be likely to receive. The right to receive a payment under the scheme was transmissible by assignment or by operation of law as personal property (s. 64, sub-s. 2).

There is nothing in the Act which precludes any notional owner from refusing to sell to a private purchaser who wanted the land for development. Nor is there anything in the Act to preclude him, in the case put, from selling it at a price in excess of 250*l*. if he can find anyone willing to pay that price. Nor is there anything in the Act, that I can find, to preclude him from saying that anyone who wants the land must also buy his claim on the fund, at whatever price he can find a willing purchaser. There were, of course, before the Act, very considerable powers of compulsory acquisition of land, in particular, powers in local authorities to acquire land for housing. Powers of compulsory acquisition by Ministers, local authorities and statutory undertakers, were dealt with in ss. 37 and 38 of the Act. The details do not, I think, matter, but those sections gave new and increased powers for compulsory acquisition.

The section with which this appeal is concerned is s. 43, which conferred powers of compulsory acquisition on the board (4). [His Lordship read s. 43 and continued:] Sir David Maxwell Fyfe's broad submission was that, on the facts, the board exercised or purported to exercise the power conferred by that section for a purpose not authorized by it.

The principle of law on which he relied is thus stated in *Sydney Municipal Council* v. *Campbell* (5): "The legal principles "governing the execution of such powers as that conferred by "s. 16, in so far as presently relevant, are not at all in con"troversy. A body such as the Municipal Council of Sydney, "authorized to take land compulsorily for specified purposes, will "not be permitted to exercise its powers for different purposes,

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(4) Town and Country Planning Act, 1947, s. 43, sub-s. 1: "The Cen"tral Land Board may, with the "approval of the Minister, by agree"ment acquire land for any purpose "connected with the performance of "their functions under the following "provisions of this Act and, in par"ticular, may so acquire any land for "the purpose of disposing of it for "development for which permission "has been granted under Part III of "this Act on terms inclusive of any "development charge payable under "those provisions in respect of that "development".

Sub-s. 2: "If the Minister is "satisfied that it is expedient in the "public interest that the Board "should acquire any land for any "such purpose as aforesaid, and that "the Board are unable to acquire the "land by agreement on reasonable "terms, he may authorize the Board "to acquire the land compulsorily in "accordance with the provisions of "this section".

(5) [1925] A. C. 338, 342.

" and if it attempts to do so, the courts will interfere. As Lord " Loreburn said, in *Marquess of Clanricarde* v. *Congested Districts Board* (6): ' Whether it does so or not is a question of " ' fact '. Where the proceedings of the Council are attacked " upon this ground, the party impeaching those proceedings must, " of course, prove that the Council, though professing to exercise " its powers for the statutory purpose, is in fact employing them " in furtherance of some ulterior object ".

The facts were fully stated by Birkett, J., but it is necessary that I should summarize them and read some of the documents. At some time in August, 1948, one Rodgers approached the applicant company's surveyors for a long lease of a plot of land on which to build a house. He was told he could have such a lease at a rent of 20*l*. 10*s*. 0*d*. inclusive of the applicants' claim against the fund, Rodgers bearing the development charge. It was not, as I understand it, disputed by the applicants that the figure of 20*l*. 10*s*. 0*d*. was greatly in excess of the existing user value, and was a figure which might well represent the full development value of the plot. This is stated by Sir William Fraser, the deputy chairman of the board, in his affidavit, as the opinion of the district valuer. It appears to have been agreed at the public inquiry hereinafter referred to. The existing use value was put by the district valuer at 35*l*. Rodgers did not accept the company's offer. What he did was to obtain in August, 1948, permission for the building of the house under Part III of the Act, and he applied on October 7, 1948, through an architect, to the board asking them to make a compulsory purchase order with a view to disposing of the plot to him. This was obviously on the basis that the board had power under s. 43 to acquire " on reasonable terms ", presumably existing use value, and then dispose of it to Rodgers at a figure which would cover that value plus the development charge.

The board wrote to the applicants' surveyors on November 1, 1948: " The Central Land Board understand that you are acting " for a client who wishes to dispose of land at Whirlow Lane, " Sheffield. The board have been informed that the price which " your client is asking for the land is 20*l*. 10*s*. 0*d*. per annum " ground rent (inclusive of the assignment of the right to claim " a payment in respect of the development value of the land out " of the 300*l*. million set aside under the provision of the Act). " This price appears to approximate to the level of prices obtained

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(6) (1914) 79 J. P. 481.

"for similar land in the neighbourhood before the Act came into "operation. I enclose a document which sets out three methods "which, in the view of the board, should be adopted by land-"owners. The board will be glad to know, as soon as possible, "whether your client is prepared to adopt one of these alterna-"tives, and if so, which".

I will read the part of the document referred to. It is headed, "House 1. Advice to Sellers", and is as follows: "Three "courses, which will be fair to buyers who want a house imme-"diately, are open to sellers of land: A. To sell the land at "existing use value, leaving the buyer to pay the development "charge (Method A). B. The seller to pay (or agree with the "board to pay) the development charge; to disclose the amount "of this charge to the buyer; and then to sell the land at a fair "price, including the development charge, direct to the person "who wishes to erect the house. This method, after discussion "and agreement with the board, can be used either for sale to "named buyer, or by public or other advertisement, or by auction "(Method B). C. The seller to pay the development charge; "erect the house himself; and then sell the house and land at "a fair price, including the development charge (Method C). "Owners of land with building value on July 1, 1948, have been "given a right by the Act to make a claim before March 31, 1949, "upon the fund of 300*l.* million set aside to meet varying cases "of hardship. No promise has been given that everyone will be "paid the whole of the market value of his loss of building rights. "Indeed, clear statements have been made to the contrary, and "that some will receive the whole loss and that some will not. "The decision will not be made (except in the cases of certain "'near-ripe' land) until 1952 or 1953, and then, by a scheme "which will require affirmative approval by Parliament, payments "will be made in 1953.

"A sale of land therefore at a price which includes building "value is unfair to buyers for two reasons: 1. It passes on the "claim to the purchaser at a definite amount, whereas the claim "is as yet unestablished and the amount is unknown. 2. It "forces the purchaser to pay for building value twice over in two "immediate payments (the purchase price and the development "charge). This places an intolerable burden on persons who "have been carefully selected for a building licence on their "urgent need for a house. In normal cases, therefore, where "an owner is not prepared to sell at a price related to Method A, "B or C, the Central Land Board will have to consider the

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" various compulsory purchase powers in the Act ". Then, at the bottom: " If sellers will sell, and purchasers will only buy, " as advised in this pamphlet, land can be sold at a price which " will not hinder or prevent houses being built ".

On November 5, 1948, the applicants' solicitors or agents replied to the Central Land Board: " In reply to your letter of " the 1st instant, we wish to correct you in paragraph one. It is " presumed that your informant wishes to acquire the land of our " client. In regard to your final paragraph, we are instructed " that our client is not disposed to adopt any of the alternatives " set out in the document referred to ". The reply from the board to that was: " With reference to your letters of 5th and " 30th November, 1948, the board note that your clients are not " prepared to adopt any of the approved methods described in " the pamphlet ' House 1 '. As far as the board are aware, the " land is not the subject of a certificate under s. 80 of the Town " and Country Planning Act, 1947. The board have notice that " planning permission for the erection of houses on the above " sites has been granted and that licences will be granted to the " would-be purchasers. It appears, therefore, that the approved " development may be hindered, if not prevented, unless the land " is made available. The board have therefore requested the " district valuer, as a matter of urgency, to negotiate with you " for the immediate purchase of the land on the basis provided " in s. 51 of the Town and Country Planning Act, 1947. This " basis the board consider to be the reasonable terms mentioned " in s. 43, sub-s. 2, of the Act ".

The board then proceeded to negotiate with the surveyors as to purchase by agreement. The surveyors asked 462*l.*, which was unacceptable to the board. On June 22, 1949, the board made a compulsory purchase order. Section 43, sub-s. 3, of the Act introduces the familiar procedure by which objection can be made to an order requiring confirmation by a Minister and a public inquiry can be held. The company objected and a public inquiry was held.

As appears from notes which are before us, the main point taken for the company was that the board were using their powers to enforce the policy set forth in House 1 and as a sanction against the company for refusing to follow it. On this view it was submitted that the order was invalid as not made for a purpose authorized by the section. On December 3, 1949, the Minister confirmed the order. There is an affidavit by the Minister. The affidavit follows the wording of the Act. There is also the affidavit from Sir William Fraser, the deputy chairman of the board. There is no challenge to the good faith of the board or the Minister. The suggestion is that they misconstrued their powers.

On the correspondence and Sir William Fraser's affidavit it seems to me clear that the board exercised their powers because the applicants were asking a price which was, as I have said, greatly in excess of existing use value. It at one time seemed as if the main point was the condition that the purchaser should take over the claim against the fund. This I think is subsidiary. As it seems to me on the documents the board might well have thought proper to seek to exercise their powers if a sum greatly in excess of existing use was being asked, although the claim on the fund was retained, though no doubt this would make it more difficult to obtain a sum so much in excess.

I do not find the case an easy one. It is plain that the section contemplates that the board may require to acquire land in connexion with their functions. Under s. 43, sub-s. 4, the board may manage land until it is disposed of, but they are prohibited from carrying out any development. Sir David Maxwell Fyfe submitted that the purpose, and the only purpose connected with the functions of the board, for which they would want to acquire land would be to test the market for the purpose of fixing development charges. He submitted that as in the future all sales would be of land restricted to its existing use, the board may well require evidence of what purchasers would give for land with permission to develop. The Attorney-General agreed that this would be a useful purpose. There is no doubt force in this. There will in the future be sales of unbuilt-on plots on the basis of restriction to existing user, or perhaps more accurately on the basis of payment of a development charge if a house is built. There will also be sales of already built houses. But there will be no sales of plots on the basis that the purchase price covers the right to develop. The Attorney-General submitted that this "purpose" is fully covered by the opening words, the first limb as it was called, of s. 43. What content is then left for the words following "in particular". I agree with Sir David's argument that the words following "in particular" must be related to a function of the board. I do not agree with the Attorney-General that it is a function of the board generally to encourage development or to see that owners do not impede development by refusing to sell or by asking excessive prices. That is the function in the main of local authorities. The board have, however, the function of assessing and collecting the development charges.

[His Lordship read the relevant parts of the regulations (7) and continued:] Those regulations cannot, of course, enlarge the powers conferred by the Act. It is, however, not disputed that they are intra vires in laying down that prima facie the development charge shall be the full amount of the difference referred to. The provisions of s. 51 support the argument that the principle embodied in the regulations is in accordance with the general intention of the Act. That section deals with the compensation to be paid in respect of compulsory acquisition by a government department or a local or public authority. Read with Sch. III the effect is that such compensation is to be based on existing use value only. The owner would, of course, retain his claim, if any, against the fund.

As it seems to me, the task of the board in working the development charge scheme is undoubtedly impeded by sales above existing use value. The problem is complicated, until the fund is distributed, by the inclusion in the sale of the speculative claim against the fund. An applicant who comes to have his development charge fixed would naturally put forward what he has had to pay for the land as the datum figure. If this were taken, the intention of the Act and regulations is defeated if the price was substantially above existing use value, subject, until the fund is distributed, to the uncertain value of the claim on the fund if that is included. If it is not so taken the development charge scheme becomes a kind of taxation operating on losses. The plot in question, ex hypothesi, will be one which none of the various public authorities want to acquire compulsorily.

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(7) Town and Country Planning (Development Charge) Regulations, 1948, Part II, General, reg. 2: "Subject to the provisions of the Act "and of any regulations made there-"under for the time being in force, "the general principles set out in the "schedule to these regulations shall "be followed by the board in deter-"mining under Part VII of the Act "whether any, and if so what, "development charge shall be paid "thereunder in respect of any opera-"tions or use of land. Schedule: "1. Development charge shall be "determined so as to secure, so far "as is practicable, that land can be "freely and readily bought and sold "or otherwise disposed of in the open "market at a price neither greater "nor less than its value for its exist-"ing use. This object is the govern-"ing principle by which the board "should be guided in determining "development charge. 2. Develop-"ment charge shall not be more than "the amount which, to the satisfac-"tion of the board, represents the "additional value, measured by nor-"mal processes of valuation, of the "land due to planning permission for "a particular development. 3. De-"velopment charge shall not be less "than the amount referred to in "para. 2 of this Schedule, unless in "the opinion of the board the charge "ought properly to be less in order to "comply with the governing prin-"ciple".

I would expect to find in the Act some power to deal with this problem, and I would have expected that power to be in the board rather than in local authorities. It was suggested that it would have been easy to make it illegal or an offence. If the whole point in the case was the inclusion of the claim against the fund I would agree that it could have been made an offence to make its inclusion a condition of a sale. Its inclusion can no doubt be used as it were as a justification put forward for a higher sum, but the real "evil" is the demanding of a sum in excess of existing use value. It would, I think, have been difficult to make this an offence. It is, in the first place, within limits a matter of opinion what existing use value in any particular case may be. It would be unfortunate to make it an offence to accept from someone willing to pay a figure higher than some tribunal might say the property was worth. The power that the board are claiming is to operate s. 43 in what they consider plain cases of excess and so have a certain control to prevent the impediments to which I have referred. No doubt if they can operate it in plain cases they can operate it in others, but if the owner is asking little, if any, more than the existing use value, there would be little, if any, point in the board using their powers, and the owner would be little, if at all, damaged if they did.

I will come back now to s. 43. There was argument as to the effect of the words "in particular". I do not accept the Attorney-General's submission that one should construe the second limb as a wholly independent power. I think the words should be construed as making clear that a certain power, as to which there might have been doubt, is to be regarded as one in connexion with the functions of the board. That the compulsory purchase order made and approved here is within the letter of the sub-section is not disputed. There is, I think, force in the Attorney-General's argument that the testing of the market purpose was fully covered by the first limb. For the reasons which I have given I think its exercise, on the facts as found, was in connexion with the functions of the board as the authority operating the development charge scheme and is therefore covered.

On this view the point taken by the Attorney-General that the matter was on any view concluded by the satisfaction of the Minister under s. 43, sub-s. 2, does not arise. He relied on *Point of Ayr Collieries Ld.* v. *Lloyd George* (8). I myself am inclined to think that if the order was outside the powers of the board under s. 43, sub-s. 1, the applicant was entitled to have it set aside as being "outside the four corners of the Act", to borrow a phrase from Lord Greene's judgment in *Point of Ayr Collieries Ld.* v. *Lloyd George* (8). I have arrived at the same conclusion as the judge, but by a somewhat different route. The judge said that if it were shown that the board had exercised their powers with the sole purpose of enforcing their policy of ensuring that land should not be sold save at existing use price he would have been of opinion that the powers of compulsory purchase could not be used for that purpose. If one considers that policy as a policy unrelated to the functions of the board in relation to development charges I would have agreed. The judge based his judgment on the fact, as I understand it, that the board had done precisely what under the second limb of s. 43, sub-s. 1, they were expressly authorized to do, and that the applicants did not on the evidence satisfy him that they had exceeded their powers. There is, if I may say so, great force in this approach to the problem. As I have indicated, it was, in my view, necessary to show that the purpose of operating s. 43 in circumstances such as those here, was related, as I hold it was, to the functions of the board in relation to development charges.

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(8) [1943] 2 All E. R. 546.

For these reasons I would dismiss the appeal.

SINGLETON, L.J. In my view the second part of s. 43, sub-s. 1, of the Town and Country Planning Act, 1947, is governed by the first part; in other words, for a "purpose connected with the performance of their functions under the following provisions of this Act", but in such event they may acquire land for the purpose of disposing of it for development . . . on terms inclusive of any development charge. The sub-section deals with the acquisition of land by agreement and the approval of the Minister if necessary.

Sub-section 2 provides that if the board are unable to acquire the land by agreement on reasonable terms the Minister may authorize the board to acquire the land compulsorily "if the Minister is satisfied that it is expedient in the public interest that the board should acquire any land for any such purpose as aforesaid". There is thus the safeguard of the Minister's approval in the first sub-section, and the necessity of the Minister's certificate that he was satisfied it was expedient in the public interest in cases falling under the second sub-section.

The functions of the Central Land Board include the fixing and collecting of development charges. If all owners of land insist on a much higher price for their land than the existing use value, and if the would-be developer has to pay development charge as well, it is obvious that development will not be as easy, nor as speedy, as it would be if the land was sold at existing use value leaving the developer to pay development charge and leaving the landowner the right to share in the 300,000,000*l.* fund set up by s. 58 of the Act. The Central Land Board are not directly concerned with development, but they are indirectly, for unless development goes along normally they will not be able to collect development charges to the extent that they otherwise would be.

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(8) [1943] 2 All E. R. 546.

The Board under s. 43, sub-s. 1, may acquire land for a purpose connected with the performance of their functions under the following provisions of the Act—one of which is the collection of development charges. The words " connected with " are wide. It seems to me that they are wide enough to cover a case in which the board think it right to acquire land in order to enable them to collect the development charge. They can only do this if the Minister approves; and sub-s. 4 provides what shall be done with the land they acquire. Under sub-s. 2 the Minister may authorize the board to resort to compulsory acquisition if he is satisfied it is expedient in the public interest. I cannot accept the argument that the sole purpose of s. 43, sub-ss. 1 and 2, was to enable the board to test the market, or to find out by dealing in land themselves what was the value of developed land. I cannot think that the power given to the board was for any such limited purpose; there is nothing in the section itself or in any other part of the Act to lead to such a construction.

It was submitted that the real reason for the making of the order in this case was to compel the owners of the land to fall in with the board's advice as to the methods which should be adopted by landowners as shown in the letter of November 1, 1948, and in " House 1 " scheme, and that, as Parliament had not said that an owner must sell his land at existing use price, the board could not put themselves in the position of the legislature and compel an owner to sell on such terms; and furthermore, that the action of the board was in conflict with s. 64, sub-s. 2, of the Act, which expressly provides that an owner of land can assign his share in the 300,000,000*l.* fund.

It may well be that the main purpose of the board was to induce landowners in general, and the company in this particular case, to adopt one of the methods favoured by the board. No doubt they believed that this was the best way of forwarding or carrying out the objects of the Act. Moreover, they considered, and rightly considered, that it was the best course to take to help them to collect development charges, and, in particular, the development charge arising out of the land in question. All these matters are in a sense allied, and I am unable to say that the board went further than they were entitled to go. The Minister directed that an inquiry be held and, after receiving the report, gave his certificate in accordance with the requirements of s. 43, sub-s. 2.

This is not a case in which it can be said that powers were exercised for a purpose differing from those specified in the statute, as was said in *Municipal Council of Sydney* v. *Campbell* (9). The power was used in order to enable the board to carry out its function of collecting development charges—perhaps I should add to make them more easy to collect—and the fact that there were other reasons within the spirit of the Act, though outside the scope of the board, does not invalidate the procedure adopted. I agree that the appeal should be dismissed.

DENNING, L.J. This case is brought by landowners to test the validity of a compulsory purchase order. The landowners, the Earl Fitzwilliam's Wentworth Estates Company, owned a plot of land near Sheffield of less than half an acre, which they desired to let on long lease for 300 years at 20*l*. 10*s*. 0*d*. a year. The Central Land Board objected to their letting it on these terms, and, in order to stop them doing so, the board have made a compulsory purchase order under which they will acquire the land for 35*l*. The validity of their action depends on the scope of their powers under the Town and Country Planning Act, 1947.

The landowners put their case in this way:—They say that this plot was suitable for building before the Act came into force and they are only asking the same price for it as they asked before the Act for similar plots. They recognize that the purchaser will now have to pay a development charge before he is permitted to build on it, but they are ready to assign to him the compensation which is payable by the State on that account. So they are not asking to be put in any better position than they were before the Act, but only that they should be no worse off. The board, on the other hand, say that they wish to protect the purchaser. They have laid it down as their policy that a landowner must sell his land at its existing use value only, and that

(9) [1925] A. C. 338.

they will, if necessary, exercise their compulsory powers of purchase in order to make him do so. In pursuance of this policy, the board propose to take this plot of land compulsorily from the owners for 35*l.*, leaving them to receive whatever compensation is payable by the State, and then the board themselves will sell the land to the purchaser on terms inclusive of the development charge. The question is whether the board are entitled to use their compulsory powers for this purpose.

The case was tried by Birkett, J., who held that if the board had exercised their compulsory powers with the sole purpose of enforcing their policy of " sales at existing use value only ", their action would be invalid; but he decided against the landowners, because he thought that in this particular case that was not the sole purpose of the board. In the course of the hearing before us, however, we all expressed the view that on the evidence the dominant purpose of the board, if not their sole purpose, was to enforce the policy of " sales at existing use value only "; and the Attorney-General did not seriously contend the contrary. He said boldly that, accepting that to be the purpose of the board, there was nothing wrong about it. So the issue of principle was fairly joined.

Before I turn to discuss it, however, I must give some description of the Act of Parliament which established the Central Land Board and gives it compulsory powers. It is the Town and Country Planning Act, 1947, which is a revolution in itself. It takes away the freedom of each man to do as he likes with his own land. No one can now develop his land, or make any material change in the use of it, without the permission of the planning authority; and if he is given permission, he must pay for the privilege. He must pay a charge to the Land Board which is calculated by reference to the increase in value of the land owing to his being allowed to develop it. For instance, if it is being used for agriculture—so that that is its existing use—and he desires to build on it, he must pay the board its development value, that is, its value as building land less its value as agricultural land. Its building value may be much higher than its agricultural value because it is near to an expanding town or to a new road made by the community. This increase in value is as a rule due to no effort by the landowner, but to the efforts of the community; and Parliament has determined to recover it for the State by imposing a development charge.

This charge is fair enough on landowners who acquired the land before or after the Act as agricultural land, but it is not fair on those who bought the land before the Act as building land and gave a building price for it; nor indeed is it fair to any landowner whose land was already suitable for development and increased in value before the Act came into operation; unless these landowners are compensated for the loss which the imposition of the charge inflicts upon them. Parliament has accordingly provided for this. It has provided that they shall be compensated out of a fund of 300,000,000*l*. which has been set aside for the purpose. This fund, however, will probably not be sufficient to compensate all the landowners for all their loss, but only some of them for some of it. For instance, a man who bought a plot of land as building land before the Act for 500*l*., whereas its agricultural value was only 100*l*., will have to pay a development charge of 400*l*. before he is allowed to build a house on it; but he will probably only get a fraction of that sum as his share of the 300,000,000*l*. So that he will not get full compensation for his loss. Hence the trouble in this case. The landowner wishes to throw the deficiency on the purchaser, whereas the board say that the landowner should bear it himself.

In order to administer this scheme, Parliament has established the Central Land Board, who act on behalf of the Crown. Their functions under the Act are of a fiscal nature. They have to assess and collect the development charge on new development, and to assess the compensation payable to individual landowners out of the 300,000,000*l*. fund. They are not themselves a planning authority. They do not themselves give or refuse permission for development: that is left to the local authorities. But nevertheless the board have been given by Parliament a power to acquire land compulsorily, and this court is today called upon to determine the extent of that power.

The purposes for which the board may acquire land compulsorily are defined by s. 43 of the Act. They fall into two: (i) the board may " acquire land for any purpose connected with the " performance of their functions under the following provisions " of this Act ". Those provisions are all of a fiscal nature. They relate to payments out of the 300,000,000*l*. fund (Part VI) and to the levy of development charge (Part VII); (ii) " and in " particular may acquire any land for the purpose of disposing " of it for development (for which permission has been granted " under Part III of this Act) on terms inclusive of any develop" ment charge payable under those provisions in respect of that " development ". It is important to notice that before this part of the section can be used by the board, the planning authority must already have granted permission to develop the land. That means that the owner of the land, or at any rate some one having a sufficient interest in the land, must have applied for permission to develop it and been granted it; or a general order must have been made by the Minister granting a general permission which covers his land.

Much discussion took place before us as to the relation of the two parts of the section to one another. In my opinion the second part is, by statutory definition, a particular instance of what the legislature had in mind in the first half. The reason for it is this: when Parliament gives to a public body a compulsory power to acquire land, it usually specifies the purpose for which the land is to be used by that body, such as for making a railway or housing the working classes or some other development which is to be carried out by the public body itself. It is rare to find Parliament giving a compulsory power of acquisition, not for the purpose of the public body using the land itself, but simply for the purpose of selling it or disposing of it to someone else. So Parliament, in order to make clear that that was the purpose in this case—and to avoid any argument on the matter—expressly gave a particular instance of what it had in mind. It made the matter even more clear by a later sub-section which says that the board are not themselves to develop any of the land which they acquire but are to dispose of it in accordance with the Minister's directions (s. 43, sub-s. 4).

I do not think, however, that the second part can be considered independently of the first part. The second part specifies only an immediate purpose which the board must have. It does not mention the ultimate purpose. It says that the board may acquire land for the purpose of resale but it does not say what the object of the resale is to be. It is rather like giving a power to acquire land for the purpose of erecting a building without saying for what the building is to be used. The immediate purpose is to erect a building, but the ultimate purpose may be to house the working classes, to provide office accommodation for municipal staff, or to keep a public house. In such a case one has to look at other parts of the Act to see whether the ultimate purpose is one which is authorized by Parliament or not. So here the second part specifies the immediate purpose, but you have to look at the first part to find the ultimate purpose. The ultimate purpose of the board must be a purpose which is "connected with the performance of their functions" under the Act. It is impossible to suppose that Parliament gave the board power to acquire land compulsorily for a purpose which was not connected with their functions.

In my opinion, therefore, the first and second parts of s. 43 fit together harmoniously. The board have power to acquire land for the immediate purpose of disposing of it for development on inclusive terms, but their ultimate purpose in acquiring it must be connected with the performance of their functions in levying development charge, or in payments out of the 300,000,000*l*. fund.

This conclusion means that the board and the Minister have misunderstood the extent of the compulsory powers which Parliament conferred on them. Both the deputy chairman of the board and the Minister have made affidavits in which they affirmed that the purpose of the board was to acquire the land "for the purpose of disposing of it for development for which "permission had been granted under Part III of the Act on terms "inclusive of any development charge". The affidavits show that the defendants thought that was all that was necessary; whereas it was also necessary, in my opinion, that the ultimate purpose should be connected with the performance by the board of their functions under the Act. The question then is: what purposes are so connected? Several were discussed in the course of the argument.

1. To test the market. Both sides agreed that the power of compulsory purchase can be used so as to enable the board to "test the market". For instance, suppose the board wished to assess the appropriate development charge in a particular neighbourhood (s. 70), it would be helpful for the board to "test the "market" by acquiring a typical piece of land compulsorily at its agricultural value and then reselling it by auction on inclusive terms at its building value. The difference in figures would give the proper development charge for that piece of land, which would be a guide for others in the neighbourhood. It may not be necessary at the present time for the board to "test the "market" in this way, because there is a good deal of evidence still available of agricultural values and building values, dating back from the time before the Act was passed: but it may become necessary to "test the market" later on when those values are out of date: because private owners will probably not be inclined to sell on inclusive terms, that is, on terms which bind the seller to pay an unknown development charge: and thus there will be nothing to guide the board in fixing the development charge, unless it tests the market itself by acquiring the land.

The purpose is therefore connected with the functions of the board under the Act.

2. To promote development. It was suggested by the Attorney-General and denied by Sir Maxwell Fyfe that the power of compulsory purchase can be used so as to enable the board to "promote development". For instance, suppose a landowner who owned land suitable for development refused to sell it for the purpose, or to allow it to be developed, his attitude would mean that the board were being deprived of the development charge on it; and in those circumstances, in order to overcome his obstinacy, the board, it was said, should be able to acquire the land at its agricultural value and sell it on inclusive terms. Sir David denied that this was a legitimate object for the board to pursue and I agree with him. It is no part of the board's functions to promote the development of land. That is the function of the local authorities and it is carefully de-limited in the various Acts dealing with the matter. The local authorities are entitled not only compulsorily to purchase land in order to develop it themselves, but also to purchase land for re-sale to private individuals in the interests of housing, or the proper planning of the area (see s. 73 (*c*) of the Housing Act, 1936, which gives a very wide power: see *Green (H. E.) & Sons* v. *Minister of Health* (10), and has been extended by ss. 1 and 9 of the Act of 1949, and s. 38, sub-s. 2, of the Town and Country Planning Act, 1947, Sch. XI, s. 19, sub-ss. 2 and 5); but there are no similar provisions in favour of the board.

The truth is that the local authorities have knowledge of local conditions and are fitted for this task of promoting development, whereas the Central Land Board are not. The function of the board is not to promote development, but only to fix and collect the development charge on such development as does take place. It is obvious, of course, that the amount which they fix may have an important influence on development. It may be so high as to hinder development or so low as to encourage it, but it does so only as an incident of their function of fixing the charge. It does not confer on them the function of promoting development independently of fixing the charge. Birkett, J., thought that the board could compulsorily acquire land in order to assist a private individual to erect a memorial hall or a library in a particular spot. I cannot agree with this. If it were correct, it would mean that the board could supplant the local authorities altogether; and could, by a side wind, overthrow all the limitations which Parliament has so carefully put upon compulsory acquisition for development purposes. The correct view is that it is no part of the board's functions under the Act to promote development and they are therefore not entitled to acquire land for that purpose.

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(10) [1948] 1 K. B. 34.

In case I am wrong about this, however, I would pause to say that the present case is not one in which the board can say that they are concerned to "promote development". This is not a case of an owner who refuses to sell his land or to allow it to be developed. The Earl Fitzwilliam Estate Company are willing to sell the land at a price which they consider reasonable, and which presumably they think they can get, if they are at liberty to ask it. For aught we know there are purchasers available who would pay the price asked and also the development charge. So development is not being held up.

3. To collect development charge. This brings me to what is, I think, the real reason why Parliament gave to the board a power of compulsory purchase: it was to assist them in their function of collecting the development charge. Take a case where the land is not only suitable for development but also—and this is the point—permission to develop it has actually been granted; and then the owner demands an extortionate price for it—a price which is so high that a purchaser cannot reasonably be expected to pay the development charge as well. In such a case the price demanded by the owner will obviously hamper the board in collecting the development charge; because any purchaser who has paid an extortionate price to the landowner will view the board's claim with righteous indignation. In order to avoid this, the board would be quite justified in seeking to acquire the land on reasonable terms, by agreement, if possible; and failing agreement, to use their compulsory powers to buy it; and then re-sell it to the purchaser on inclusive terms. That seems to me to be just the sort of case which is contemplated by Parliament in s. 43 of the Act. It is a purpose which is connected with their functions under the Act, because it is done to facilitate the collection of the development charge.

The question, therefore, is: did the board exercise their powers in the present case in order to facilitate the collection of development charge? Here, I think, is the crux of the case. It was certainly not the major purpose but I think that it was *one* of the purposes of the board. Permission to develop this land had already been granted, and the price demanded by the landowners was so unreasonably high that it was likely to hamper the board in collecting the development charge from the purchaser. But the board certainly had another purpose in mind too. They exercised their powers in order to enforce their policy of "sales "at existing use value only". That indeed was their dominant purpose. They chose this case, not so much because it assisted them to collect development charge, but much more because it was an excellent case in which to enforce their policy. It was a case which was likely to win the support of the Minister and of the courts, and it has in fact done so. But this is the very point at which we must be on our guard lest a dangerous inroad is made unawares upon some of our important principles. The validity of the board's action depends on the purpose with which it was done. There were two purposes here. One purpose was to collect development charge; the other purpose—and the dominant purpose—was to enforce a policy.

What is the legal position when the board have more than one purpose in mind? In the ordinary way, of course, the courts do not have regard to the "purpose" or "motive" or "reason" of an act but only to its intrinsic validity. For instance, an employer who dismisses a servant for a bad reason may justify it for a good one, so long as he finds it at any time before the trial. But sometimes the validity of an act does depend on the purpose with which it is done—as in the case of a conspiracy—and in such a case, when there is more than one purpose, the law always has regard to the dominant purpose. If the dominant purpose of those concerned is unlawful, then the act done is invalid, and it is not to be cured by saying that they had some other purpose in mind which was lawful: see what Lord Simon, Lord Maugham and Lord Wright said in *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* (11).

So also the validity of government action often depends on the purpose with which it is done. There, too, the same principle applies. If Parliament grants a power to a government department to be used for an authorized purpose, then the power is only validly exercised when it is used by the department genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose, but is subordinated to some other purpose which is not authorized by law, then the department exceeds its powers and the action is invalid. The department cannot escape from this result by saying that its motive is immaterial. Just as its real purpose is crucial, so also is its true

(11) [1942] A. C. 445, 452–3, 469, 475.

motive, because they are one and the same thing: see *Crofter Hand Woven Harris Tweed Co.* v. *Veitch* (11), *per* Lord Maugham and *per* Lord Wright.

4. To enforce a policy. It is necessary therefore to consider the dominant purpose of the board in this case. It was to enforce their policy of "sales at existing use value only". They have laid it down as their policy that a landowner must sell his land at its existing use value only; and that they will, if necessary, use their powers of compulsory purchase in order to make him do so. It was in pursuance of this policy that they used their powers in this case. The purchaser, Rodgers, entered into negotiations with the landowners to take the land at the price asked by them. A draft agreement was drawn up between them. The purchaser's architect then wrote to the Land Board saying that "as the landowner does not propose to lease this land to my "client at present use value, will you please make a compulsory "purchase order or lease for the benefit of my client". Thereupon the Central Land Board intervened. They sent the landowner a copy of their pamphlet "House 1", which set out their policy, and asked him if he would adopt one of the alternatives which it contained. It was framed in the form of "advice to "the seller", but the practical effect of it was to tell the landowner that, if he left the purchaser to pay the development charge, he was to sell only at existing use value; and that if he refused, the board would consider exercising their powers of compulsory purchase. He did refuse and they did exercise their powers. Hence this action.

It may surprise some people to know that landowners are able to find purchasers who are ready to pay the building value of the land and also to pay the development charge, for it means that the purchaser has to pay development value twice over, once in the price he pays to the landowner, and again the charge he pays to the board; subject, however, to a deduction for the amount he receives from the 300,000,000*l*. fund. But in practice landowners can often get building value for the land, because houses with vacant possession are so scarce and so expensive to buy. The annual report of the board to Parliament shows that it often happens that if a person is fortunate enough to get a building licence, it may be cheaper for him to pay all the costs of building a house (including paying building value to the landowner, development charge to the board, and the cost of labour and materials to the builder) than it is for him to buy an existing house with vacant possession. Landowners are therefore able to obtain a price much in excess of existing use value. This evidently appeared to the board to be very undesirable, and, in order to prevent it the board's policy, as stated by them in their annual report, "has been to select a certain number of typical "cases in which to consider using their compulsory powers, these "selected purchases being designed to serve as a warning to "owners of land in general".

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(11) [1942] A. C. 445, 452–3, 469, 475.

The question is whether it is permissible for the board to use their powers to enforce this policy. There can, I think, be no doubt that Parliament expected that, after the Act was passed, land would, in the ordinary way, change hands at its existing use value only. That is what anyone would expect from the imposition of a development charge. If a purchaser has to pay the development value to the State, he will presumably only pay existing use value to the landowner. That is a perfectly sound economic theory, and the Minister, with the approval of Parliament, made regulations designed to give effect to it. He declared that the development charge should be fixed at 100 per cent. of the development value, and he did this expressly so as to secure, so far as practicable, that the land should change hands at its existing use value only (see S.I. 1948, No. 1189). But while it is one thing to rely on economic forces, it is quite another thing to impose a policy on the people by legal sanctions.

Parliament did not attempt to do so. It did not itself enact any positive law that land was to change hands at its existing use value only, nor did it authorize anyone else to make such a law. There were good reasons why it should not do so, for it might lead to grave injustices as well as practical difficulties. Take the injustices first: suppose that a man bought land in 1945, before the Act, at its building value of 500*l.*, whereas its agricultural value was only 100*l.*, why should he be compelled to sell it to a private person after the Act for 100*l.* Why should he not be at liberty to sell it at the same price as he gave for it, 500*l.*, assigning to the purchaser his rights out of the 300,000,000*l.* fund? By so doing he would not be making a penny profit, and he would be putting the purchaser in the same position as he was in himself. Parliament has indeed recognized the validity of such an assignment by s. 64, sub-s. 2, of the Act. Suppose now that the seller had bought the same land in 1938 as building land for 250*l.*, but it had increased in value in 1945 to 500*l.*, why should he be compelled to sell it after the Act for 100*l.* only?

Why indeed should he not sell it for 250*l.*, or even more, if the purchaser was willing to pay it, assigning to the purchaser his rights out of the 300,000,000*l.* fund? There is nothing in the Act to prevent it.

Again, suppose that a landowner wanted to keep a field near his house, not built upon, so as to preserve its amenities, would it not be legitimate for a purchaser to offer him a higher price so as to overcome his reluctance? There is nothing in the Act to prevent it. Apart from such injustices, there would be practical difficulties which the Uthwatt Committee foresaw. They said (Cmd. 6386 of 1942, p. 46): "We are prepared to face the possi-"bility or the probability that, in order to clear the ground, the "intending developer may see that in some form or other the "landowner gets more than he would on a compulsory acquisition. "That possibility or probability cannot we think be effectively "provided against, and it is not worth while making the attempt. "If the parties can come to an accommodation, we see no reason "why they should not do so". These considerations lead me to the conclusion that Parliament quite deliberately did not make any positive enactment that land was to change hands at its existing use value only. They preferred to rely on the economic theory that the development charge would, as a rule, leave the developer unable or unwilling to pay more than existing use value for the land.

The expectations of Parliament, however, have not been fulfilled. The board state in their annual report that the economic theory "is not at present working out in practice". There is, they say, "a large number of transactions at prices much in "excess of existing use value". In an attempt to stop them the board have rushed in where Parliament—I will not say feared to tread—but, at any rate, did not tread. They have issued pamphlets in which they have proclaimed their policy of "sales "at existing use value only" and sought to enforce it by the use of their powers of compulsory purchase. Is this lawful? The Attorney-General says it is. The Central Land Board, he says, are entrusted by Parliament with a compulsory power to acquire land for the purpose of re-sale on inclusive terms. They can quite truthfully affirm that that is their purpose even though they may have at the same time an ulterior object in view, as for example in this case, where their ulterior object is to induce the landowners of the country to conform to the policy which the board lay down, or, as the board would no doubt prefer to put it, to persuade the landowners to follow the advice which the board gives them. The

Attorney-General did not shrink from this conclusion. He said that the ulterior object of the board was immaterial so long as their immediate object was to re-sell, and that the safeguard for the people was that the board could not exercise the power unless the Minister was satisfied that it was expedient in the public interest. The Minister, he said, could consider the ulterior object of the board, but the courts could not do so. Once the Minister declared himself satisfied that it was expedient in the public interest, that was the end of the matter. So said the Attorney-General, referring to *Point of Ayr Collieries* v. *Lloyd George* (12) and *Carltona Ld.* v. *Commissioners of Works and Others* (13).

Let us pause for a moment to see what this means. It is, in its effect, though not in its terms, a claim by a government department to legislate. The policy of "sales at existing use value "only" may be an excellent policy, and a policy which it is very proper to encourage by economic means; but once the board proclaim that they will use their compulsory powers to enforce it, then it ceases to be a policy and becomes a law, and, be it noted, a law laid down by a government department and not by Parliament. Though it is called advice, it is nevertheless a rule of conduct which all landowners are expected to obey, and, if they disobey, it is enforced by a powerful sanction, namely, compulsory purchase. A general rule of conduct of that description, so enforced, is legislation and nothing else, and as such it is invalid unless it has been enacted by Parliament, or by some one to whom Parliament has delegated its legislative authority.

The policy is, no doubt, well conceived for the purpose of protecting purchasers from extortionate demands by undeserving landlords, but nevertheless I cannot allow the goodness of it to cloud my judgment as to the validity of the board's action, for, by the same token, the board and the Minister might proclaim a thoroughly bad policy to which they expect all landowners to conform, and then enforce it by means of the same compulsory powers. It is axiomatic in our constitution that no government department has any right to legislate except in so far as Parliament has said that it may, and the mere fact that Parliament has granted to a department executive powers does not carry with it any right to use those powers for legislative purposes. I do not agree with the contention that, once the Minister says he is satisfied, these courts cannot look behind it to see what he is doing. If a government department, however well intentioned, takes upon itself the functions of Parliament and seeks to legislate, without any authority in that behalf, then it is the duty of these courts to intervene in these days as they did in days past when another executive power sought to legislate by means of Proclamations without the authority of Parliament: see *The Case of Proclamations* (14).

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(12) [1943] 2 All E. R. 546.

(13) [1943] 2 All E. R. 560.

A little reflection will be sufficient to show how undesirable it is that executive powers should be used for legislative purposes. However good may be the intentions of the framers of this policy, nevertheless it suffers from the great drawback that it is capricious in its operation, because the government department can enforce it, or dispense with it, in any particular case just as it pleases. Take this very case. The policy of the Central Land Board of " sales at existing use value only " is not enforced in every case, but only in those cases which the board select for its enforcement. Many landowners still sell with impunity at prices much in excess of existing use values. Only a few are picked upon by the board for compulsory purchase, " those selected purchases " as the board say " being designed to serve as a warning to owners of " land in general ". But see how much a matter of chance it is. If a purchaser chooses to pay more than existing use value, he is perfectly at liberty to do so, and no one can say him nay. If he prefers to report the matter to the Central Land Board, he can do so; but it is entirely for the board to decide whether it will take action or not, and that depends on whether it considers it expedient to do so or not. The annual report of the board to Parliament shows that there is a large number of transactions at prices much in excess of existing use value, and that it is only in very few cases that the board have considered it expedient to interfere. This means that the rights of the parties do not depend, as John Locke said they ought, on " established standing " laws promulgated and known to the people ": Essay on Civil Government, para. 131. They depend on the views of expediency which a government department may entertain.

The serious thing about it is that the policy of the board goes much further than Parliament authorized them to go. Their pamphlets apply to *all* sales and purchases of land, whereas the compulsory powers on which they rely are expressly confined to land for which development permission has already been given. They have no right whatever to interfere in sales of land where no development permission has been given—and these are of course the great majority of sales. Yet the pamphlets give the impression that they have the power to interfere. It is quite clear that, so long as no development permission has been given, the owner of a piece of land has a perfect right to sell it at a reasonable price, even though that price is in excess of the existing use value, especially when he is ready to assign to the purchaser his claim on the 300,000,000*l*. fund. I have already given some illustrations of this. Nevertheless many a landowner who read the pamphlet would feel that, if he tried to do so, the board might use their compulsory powers against him. He would in consequence refrain from selling at any price higher than existing use value. That is indeed just the result which the board intended the pamphlets to produce. Thus innocent people may be led to forgo their rights when there is no law on the statute book against it.

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(14) (1611) 12 Co. Rep. 74.

My conclusion therefore is that the ultimate object of the board and the Minister is one which is not lawful, because it is not their function to legislate. I would willingly support their action, if I could, because I see no reason why this landowner should make an undeserved profit out of the purchaser. But there is a principle at stake which is far more important than the stopping of one particular piece of profiteering. The principle is that the legislative power in this country resides in Parliament and not in the government departments. If once it appears that the ultimate object of the board is one which is not authorized by Parliament, then it is the duty of the courts to interfere, for it is a principle of our law that a public authority, which is entrusted with executive powers, must exercise those powers genuinely for the purposes for which they are conferred. They must not be used for an ulterior object, which is not authorized by law, however desirable that object may seem to them to be in the public interest: see *Sydney Municipal Council* v. *Campbell* (15) and *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Bell London and Provincial Properties Ld.* (16).

I am greatly strengthened in this view by the judgment of Birkett, J., who said quite clearly (17) that the powers of the board did not enable them to exercise and enforce a policy that land should not be sold at a price greater than its existing value. He only decided in favour of the board because he thought it was not their *sole* purpose to enforce their policy. It was at that point, in my opinion, that he fell into error, for, even if it was

(15) [1925] A. C. 338, 343.
(16) [1949] 1 K. B. 666, 678-681.
(17) [1951] 1 K. B. 217.

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v.
MINISTER OF TOWN AND COUNTRY PLANNING.

Denning, L.J.

not their sole purpose, nevertheless if it was their predominant purpose, as it clearly was, that is sufficient to invalidate their action.

After all is said and done it comes to this: the Central Land Board required this landowner to conform to their policy of "sales "at existing use value only", and because he refused they took his land compulsorily at that value. I do not think that they had any right to do this. If it is to be the law of this country that landowners are to sell their land at existing use values only, that law should be enacted by Parliament. It is often said that Parliament can do anything, but I do not know that even Parliament can so divest itself of its functions as to leave the making of such an important enactment to a government department without any consideration of it by Parliament itself. I would therefore be in favour of allowing the appeal.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Warren, Murton & Co., for Newman & Bond, Barnsley; Treasury Solicitor.*

A. W. G.

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Apr. 19, 20, 23, 24, 25, 26.

Somervell, Singleton and Birkett, L.JJ.

BIGGIN & CO. LD. *v.* PERMANITE LD. AND OTHERS.

[1949 B. 172.]

Damages—Measure of—Sale of goods—Resale—Foreseeable consequences of breach of contract—Compromise by plaintiffs of other proceedings—Vendor's liability to plaintiffs—Reasonableness of compromise.

The plaintiffs bought from the defendants certain goods for re-sale, as the defendants knew, to the Dutch Government. They proved to be unsatisfactory and the Dutch Government claimed damages and withheld payment for other goods sold to them by the plaintiffs, but, while refusing to submit to the jurisdiction of the English courts, consented that the claim should be submitted to arbitration in England. Acting on legal advice the plaintiff settled the case, agreeing to pay to the Dutch Government 43,000*l.* and the costs of the proceedings, and claimed to recover this amount from the defendants.

Devlin, J., ruled that the settlement was wholly irrelevant and evidence of it inadmissible. On appeal by the plaintiffs:—

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Biggin & Co. Ld. v. Permanite Ld.

Held, that the amount paid under the settlement being admittedly an upper limit prima facie led to the conclusion that, if reasonable, it should be taken as the measure of damages, and whether or not it was reasonable, was a question to be determined by evidence; and in the circumstances this evidence established that it was reasonable.

Decision of Devlin, J., [1951] 1 K. B. 422, reversed.

Appeal from Devlin, J. (1).

The plaintiffs, Biggin & Co. Ld., and Archibald Bathgate (Building Materials) Ld., two associated firms, were requested in 1945 by the Royal Netherlands government to supply them with considerable quantities of bituminous adhesive for use with roofing felt previously purchased by that government from the plaintiffs for emergency rehousing in Holland. Bitumen being then scarce and not exportable from Great Britain, the adhesive had to be of fluxed pitch. The Dutch government also stipulated that it should be such as could be applied cold. The plaintiffs passed the inquiry on to the defendants, Permanite Ld., who ordered the material from third parties who were manufacturers of specialized products from bitumen and other similar substances.

About 2,500 tons of a product called permasec were shipped, and certain quantities of it were resold by the Dutch government to various contractors. The results of the application of permasec were in many cases unsatisfactory. Most of it was applied in the winter of 1945, and in the warm spring of April, 1946, it began to run (or creep) and drip down from the eaves and through interstices in the roofs into the buildings. As a result claims were made against the government for the damage done.

In May, 1946, the government asked the suppliers to take back the unsold permasec, but they refused, and the government, who had to dispose of the product at a heavy loss, thereupon withheld a sum of 55,000*l.* which they owed to the plaintiffs for roofing felt. The government were not willing to allow themselves to be sued by the plaintiffs in the English courts, but they agreed to arbitrate, and on the first day of the hearing a settlement was arrived at, the plaintiffs, on the advice of their counsel, Sir Valentine Holmes, K.C., agreeing to pay the Dutch government 43,000*l.* and their costs. The plaintiffs, in the present proceedings, claimed from the defendants the above sum, together with their own costs of the arbitration and the costs of the Dutch government, as damages for breach of warranty, and

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(1) [1951] 1 K. B. 422.

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the defendants brought in as third parties Berry, Wiggins & Co. Ld., the manufacturers of the product.

On July 28, 1950, Devlin, J., in a reserved judgment (1), held that, since a defendant, required to indemnify a plaintiff against his liability to another party, was entitled to have the existence and precise extent of liability proved against him in proceedings to which he was a party, and since the compromise between the plaintiffs and the Dutch government was not a foreseeable consequence of the making of a claim but flowed from the voluntary act of the plaintiffs, such a compromise was irrelevant to the issue of damages between the plaintiffs and the defendants. Evidence of that settlement, he held, was irrelevant and inadmissible, and the claim for 43,000*l.* as a lump sum failed. He assessed the damages recoverable in respect of loss on resale by the government of 1,350 tons of permasec at 5*l.* per ton, and said that, if necessary, there must be an inquiry to assess the claims of Dutch contractors against the Dutch government.

The plaintiffs appealed.

Beyfus, K.C., and *Stenham* for the plaintiffs. The judge held that the settlement was wholly irrelevant to the question of damages and refused to admit the evidence of Sir Valentine Holmes, K.C., who had advised the plaintiffs to agree to the settlement. It is submitted that the judge was wrong, and that, if the plaintiffs called evidence which showed that the settlement was a reasonable one, though it might not strictly prove every item of damage claimed, that settlement should be accepted by the court as the measure of damage.

[*Hammond & Co.* v. *Bussey* (2); *Grebert-Borgnis* v. *Nugent* (3); and *Fisher* v. *Val de Travers* (4) referred to.]

Sir Walter Monckton, K.C., Karmel, K.C., and *C. R. Beddington* for the defendants. There was ample evidence on which the judge could assess the damages suffered by the Dutch government at the figure he did. In order to show that the settlement was reasonable the plaintiffs must prove that the sum paid is at least as big as their liability to the Dutch government. In order to do that they must establish their case by evidence and figures.

[*Kiddle* v. *Lovett* (5) referred to.]

(1) [1951] 1 K. B. 422.

(2) (1887) 20 Q. B. D. 79.

(3) (1885) 15 Q. B. D. 85.

(4) (1876) 45 L. J. (C. P.) 479; 35 L. T. 366.

(5) (1885) 16 Q. B. D. 605.

SOMERVELL, L.J., stated the facts and continued:—The first problem is, in my opinion, whether the judge was right in rejecting the 43,000*l.* altogether, treating it as irrelevant. I will read what he said: " Accordingly, I rule that the plaintiffs cannot " prove their damages by reference to the settlement which they " made with the Dutch government; and that evidence relating " to such a settlement is irrelevant and inadmissible. I must " make it clear that no criticism has been made of the counsel " and solicitors who unanimously advised the settlement, nor of " the wisdom of their advice ". The plaintiffs put it forward in their pleadings and they called, for instance, the solicitor and Sir Valentine Holmes, K.C., who was advising the plaintiffs at that time and advised the settlement. Their submission was that, if it can be shown that a settlement has been made under competent advice and if the advisers are submitted to cross-examination, that is enough. I do not accept that view, as will appear; but Mr. Beyfus, who now appears for the plaintiffs, put it in another way, and Sir Walter Monckton agreed that it was so put below, as follows: evidence may be called which may not strictly prove every item of the damage, but which will show that this was a reasonable settlement, having regard, not to the wisdom of the advisers, but to the evidence as called. That also has to be considered.

As I have said, there is no suggestion that the defendants did not contemplate the sale by the plaintiffs to the Dutch government, and the defendants do not dispute that the damages are to be assessed on the basis of liability to the Dutch government, subject, if necessary, to its being shown, for example, that some different term had been introduced into the contract. The only question, therefore, at the moment is: what is the effect of a settlement in these circumstances?

We were referred to the well-known case of *Hammond & Co.* v. *Bussey* (6), in which the plaintiffs had been sued by a sub-purchaser. It was a case in which the defendant had been consulted. He insisted, as here, that the goods were according to contract, and he refused, as it were, to take part in or be bound by the proceedings. The plaintiffs were sued by the sub-purchaser, and damages were awarded against them. The defendant admitted his liability to pay those damages; so it does not throw any light on what would have been the position if he had not.

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(6) (1887) 20 Q. B. D. 79.

Argument took place on costs, and the court held that the plaintiffs could recover the costs they had had to pay in the proceedings.

A passage from the judgment of Bowen, L.J., is of assistance with regard to the problem here. He said (7): "The defendant "knew for what purpose the plaintiffs were purchasing the coal, "namely, to resell it to the owners of steamers, and he must "have known as a business man what damages might naturally "result to the sub-vendees if it was not reasonably fit for the "purposes of steamships, and therefore could not be used by the "sub-vendees for such purposes. He may therefore be reasonably "supposed to have contemplated, if the warranty were broken, "that claims for damages would be made against the plaintiffs "by the sub-vendees, and also, if he thought about it, he must "have known that the plaintiffs, if such claims were made, would "be in a position of difficulty: on the one side would be the "sub-vendees who had tried the coal insisting that it was bad "and incapable of being used as steam-coal, and that they had "in consequence sustained damage; on the other side would be "the defendant, who knew more about the origin of the coal than "the plaintiffs did, and who might refuse to be bound by any "action they might take with regard to the sub-vendees' claims "and assert that such action was unreasonable. What under "such circumstances might the defendant be reasonably supposed "to contemplate in the event of such a contingency happening? "Obviously that the plaintiffs would come to their vendor in order "to know how to deal with the claim, and that it would depend "very much on what he said what course they would take, and "whether they would defend the action or not. If the vendor "said that the assertions of the sub-vendees with regard to the "inferior quality of the coal were unfounded, the plaintiffs would "naturally attach much weight to that; on the other hand, if "he said that he had been imposed on by his vendors, naturally "they would submit to the claims of their sub-vendees. What "further could the defendant reasonably be supposed to contemplate? Why that, if under such circumstances he told the "plaintiffs that, if they did not defend the action, it would be "at their own responsibility and risk, and that the coal he sent "was according to contract, the plaintiffs' only reasonable course "would be to fight the action in order to thrash the question out; "and then, of course, if the plaintiffs succeeded in their defence, "there would be no occasion for their making any claim over;

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(7) Ibid. 94.

" but if they failed the defendant must in reason be taken to " have contemplated that they would have to pay damages and " costs. All these matters I have mentioned seem to me to be " matters that may reasonably be supposed to have been within " the contemplation of the parties at the time they made the " contract, and therefore the question whether the case comes " within the second branch of the rule in *Hadley* v. *Baxendale* (8) " seems to me to be answered, unless the argument of the defen- " dant's counsel with regard to the construction of that rule is " to be accepted "; and he later in his judgment rejects the argument of the defendant's counsel.

We were also referred to *Grebert-Borgnis* v. *Nugent* (9). The interest of that case was this: it was a similar case of a sub-purchaser, who had been sued in a French court and was held liable to pay 28*l.* That presumably was the equivalent of the francs, and the court held that the 28*l.* which the French court had given might be treated as not an unreasonable sum at which such damages might be assessed. It was in that case that Bowen, L.J., stated what was accepted by the judge and by counsel in this case, that, where there is an award or a judgment or, as here, a settlement, that is the limit of what the plaintiff can claim against the defendant. Bowen, L.J., said (10): " The " limit of the liability must clearly be what the purchaser had " to pay ". Discussing the 28*l.*, he said: " Now here, looking " to the circumstances, can it be said that 28*l.* was an unreason- " able sum to give when it was quite certain there would be some " liability as a matter of business, and the plaintiff actually did " suffer 28*l.* damage? " Bowen, L.J., I think, clearly did not treat the fact that it was a judgment of court as concluding the matter. You have to consider whether it was a reasonable sum.

Here, of course, we are concerned with a settlement, and Sir Walter Monckton drew our attention to *Kiddle* v. *Lovett* (11). There a platform put up for the plaintiffs by the defendant, to enable the plaintiffs to paint a house, fell and hurt a painter in the employment of the plaintiffs. The injured man brought an action under the Employers' Liability Act against the plaintiffs for injuries sustained in consequence of the defective state of the boat-staging. The plaintiffs settled the action by paying to the painter 125*l.*, and then sued the defendant for breach of his

(8) (1854) 9 Ex. 341.
(9) (1885) 15 Q. B. D. 85.
(10) Ibid. 93, 94.
(11) (1885) 16 Q. B. D. 605.

contract; and it was held "that the defendant was liable under "the contract; but that, inasmuch as the plaintiffs had employed "a competent contractor to put up the boat-staging, and there "was, on the facts, no evidence of negligence by the plaintiffs, "they were not liable to their servant for the injury he had "sustained, and therefore the money which they had paid to "settle his action was not recoverable as damages from the defen- "dant for his breach of contract". That, of course, turned on the Employers' Liability Act as it then stood, and it shows—and Mr. Beyfus did not dispute this—that it is open to the defendant to show that the plaintiff was not liable to pay anything, and therefore could not say that what he did pay was a sum which he could recover against the defendant.

Mr. Beyfus also relied on *Fisher* v. *Val de Travers* (12). I will read the headnote to make clear the short point which emerges: "In consequence of the defective state of some asphalte "pavement belonging to a tramway company, H., while driving "over it in his cart, was thrown out and injured, and forthwith "made a claim for compensation on the tramway company. The "tramway company had made a contract with the plaintiffs, by "which the plaintiffs were to lay down the asphalte and keep "the same in repair for one year (at the time of the accident "unexpired), and the plaintiffs had entered into a similar contract "with the defendants. On receiving notice of H.'s claim the "tramway company gave notice to the plaintiffs to meet it, and "the plaintiffs handed on the notice to the defendants. The "defendants refused to meet the claim, and the plaintiffs were "compelled to undertake the case themselves, and forthwith "entered into negotiations with H., which eventually resulted in "a compromise of the claim for a certain sum paid to H. by way "of compensation, with costs of settlement. In an action by the "plaintiffs over against the defendants to recover the sum paid "by way of compromise to H. and the costs incidental thereto, "the jury found that the compromise was reasonable and that the "costs were reasonably incurred". Then it was held—and this was the point which was overruled in *Hammond* v. *Bussey* (13)—that the costs were not in law recoverable.

The action was tried by Lord Coleridge, C.J., and a special jury, and he left them two questions, which are really only one. The jury found "that the plaintiffs had acted reasonably in com- "promising Hick's claim, and that the sum paid as compensation

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(12) (1876) 45 L. J. (C. P.) 479; 35 L. T. 366.

(13) 20 Q. B. D. 79.

"was reasonable". It would seem to be difficult to say that, if the answer to the second question was "Yes", the answer to the first question could be "No". So, though, of course, we are not told what happened before the judge and jury, I think that the effective question left was: was the compensation reasonable? I think that that indicates that there must have been at any rate some evidence (as, for instance, the nature of the injuries and so on) on which the jury could come to a conclusion on that point.

I think that the judge here was wrong in regarding the settlement as wholly irrelevant. I think, though it is not conclusive, that the fact that it is admittedly an upper limit would lead to the conclusion that, if reasonable, it should be taken as the measure. The result of the judge's conclusion is that the plaintiffs must prove their damages strictly to an extent to show that they equal or exceed 43,000*l.*; and that if that involves, as it would here, a very complicated and expensive inquiry, still that has to be done. The law, in my opinion, encourages reasonable settlements, particularly where, as here, strict proof would be a very expensive matter. The question, in my opinion, is: what evidence is necessary to establish reasonableness? I think it relevant to prove that the settlement was made under advice legally taken. The client himself could do that, but I do not think that the advisers would normally be relevant or admissible witnesses. I say "normally". It may be that in special cases they might be. The plaintiff must, I think, lead evidence, which can be cross-examined to, as to facts which the witnesses themselves prove and as to what would probably be proved if, as here, the arbitration had proceeded, so that the court can come to a conclusion whether or not the sum paid was reasonable. The defendant may, by cross-examination, as was done here, seek to show—and perhaps successfully show—that it was not reasonable. He may do so, or call evidence which leads to the same conclusion. He might in some cases show that some vital matter had been overlooked. In the present case, of course, Sir Walter Monckton relies, rightly, on the judge's finding with regard to the first head of damage, on the fact that the evidence showed that too much was bought, and so on; but if there is evidence at the end of the matter of the kind which I have indicated, on which the court can come to the conclusion that this was a reasonable settlement in the circumstances, then I think that it should be the measure. Parties, Bowen, L.J., said, have been held to contemplate litigation in the sort of circumstances which have

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arisen here. It would, I think, be unfortunate if they were not also held to contemplate reasonable settlements in the type of circumstances which have arisen here.

If that is right, then I pass to the next question, which is whether the plaintiff shows that, on the evidence, this was a reasonable settlement. That makes it necessary to examine the judge's conclusion on the two points, for I think that if he was right on the first point, namely, that only 6,750*l*. was due in respect of the first head of damage, the unsold 1,350 tons, it might be difficult for Mr. Beyfus to satisfy me, at any rate, that the settlement was reasonable.

[His Lordship then referred at length to the evidence called at the trial and continued:] In my opinion, for the reasons which I have tried to give, the 43,000*l*. is the measure of the defendants' liability to the plaintiffs, and there must be judgment for that amount, with the items of costs which are not disputed and with some arrangement as to interest, which we can be told about. I should, I think, have added that Sir Walter Monckton indicated a cross appeal; but, as he said, if my judgment was based on points which I was asking him to argue, it did not really arise.

Singleton, L.J. This was a very complicated dispute. It involved many days of the time of Devlin, J., and rightly so. Before this court, the evidence had been very much cut down, so that we had a transcript only of what was material for the hearing before us; and the appeal was argued on both sides in a way to bring the necessary considerations before the court at the least cost to the parties, which is always an advantage.

The dispute arises out of two contracts for the sale of the material known as permasec. At the time when the contracts were entered into, the defendants were informed by the plaintiffs of their negotiations with the Royal Netherlands government and of the purpose for which the material was required. The judge, in the course of his judgment, said: "It is not disputed that the "defendants ought to have foreseen a claim by the Dutch "government". That was, of course, in the event of a breach of contract. What happened is thus stated by the judge: "Deliveries began in April, 1945, f.a.s. Miller's Wharf on the "Thames. The Dutch government transported the material to "Holland and re-sold it to numerous Dutch roofing contractors. "The results of the application of permasec were in many cases "unsatisfactory. Most of it was applied in the winter of 1945, "and in the warm spring of April, 1946, it began to drip and "run; 'creep' is the term used in the trade. Outside the "buildings it dripped down from the eaves, and it found its way "through the roofs and dripped inside the buildings too. The "roofs had to be repaired or renewed, and claims were made on "the Dutch government. In May, 1946, the government asked "the plaintiffs and defendants to take back 1,400 tons of the "stuff which was unused, but they would not".

Devlin, J., continued: "In stating the facts as I have, it "will be obvious that I have, where there was a conflict, rejected "the evidence of Turney [the general manager of the defendant "company] and accepted that of Robinson and Church; and I "shall state shortly my reasons for so doing. The chief point of "conflict between Robinson and Turney is in the interview of "April 13". Then the judge stated his reasons, and added: "Lastly, I was not favourably impressed with the demeanour "of Turney as a witness. I should not think it safe to reject his "evidence purely on demeanour. But, apart from the matters I "have mentioned, I could not accept it without rejecting both the "evidence of Robinson and of Church; for in separate and distinct "matters, in which there is hardly room for mere differences in "recollection, they both contradicted Turney; and both Robinson "and Church impressed me positively and forcefully as truthful "witnesses".

After a reference to the position of the third parties, the judge added: "Turney, on the other hand, was engaged in a piece of "dishonest trading, which ought not to be passed by without "condemnation. He was engaged in securing, in exchange for "the negligible services that his company were rendering, a profit "of about 40 per cent.; and with that as his incentive he "deliberately deceived the plaintiffs and the Dutch government "about the nature of this product. I do not doubt that the "words which he falsely put into the mouth of Robinson, and "which I have quoted above, were in truth the thoughts in his "own mind. His actions show a callous disregard of the probability that defects in this material, against which the Dutch "government might have been warned, or which for an additional "cost of a trifling part of his profit (the substitution of a light "naphtha would have made about 1*d*. a gallon difference) might "have largely been cured, might cause inconvenience and discomfort to homeless people and hinder a friendly government "in the urgent work of post-war reconstruction".

The result of this was a very large claim by the Royal Netherlands government against the plaintiffs. That government would not submit to the jurisdiction of the courts of this country, but they were willing to submit, and did submit, the dispute to arbitration. If they had sued in this country, the present plaintiffs would have been able to bring in the defendants, Permanite Ld., as third parties. The defendants were not willing to be bound in any sense by the arbitration. They disputed liability throughout. The arbitrator was to decide, in the first place, the question of liability between the Royal Netherlands government and the plaintiffs. Though there was much information as to the measure of damages in the event of liability being established, it is by no means clear that all the material was available. The present plaintiffs settled the dispute with the Dutch government on the basis of a payment or an allowance of 43,000*l.* and costs. In due course, the plaintiffs claimed against the defendants. The defendants contested the claim. Devlin, J., gave judgment in favour of the plaintiffs, with damages to which I shall return in a moment. He did not accept the plaintiffs' contention that the proper measure of damages was the sum of 43,000*l.*, the settlement figure. In this court, the defendants have not sought to dispute liability, but we have been concerned almost wholly with the plaintiffs' appeal based on the contention that the damages awarded by the judge should be increased.

The plaintiffs' claim was thus expressed in the statement of claim: "After inspection of the documents disclosed by the "Royal Netherlands government in the said arbitration it "became apparent to Biggins and their advisers that it would be "virtually impossible successfully to resist the claim of the Royal "Netherlands government and accordingly a compromise was "arrived at and Biggins consented to a final award in favour of "themselves for 55,083*l.* 4*s.* 11*d.* on their claim and in favour "of the Royal Netherlands government for 43,000*l.* with the costs "of the arbitration, including the costs of the award, to be taxed "if not agreed, on the claim of the Royal Netherlands govern-"ment for damages. The said compromise was reasonable". An amendment contains the heads of damages on the other basis, *i.e.*, damages in respect of the 1,400 tons of material left on the hands of the Dutch government under head A, and the damages which were claimed against, and some of which had been paid by, the Dutch government under head B.

The claim of the plaintiffs was for damages. They said that the damages should be the sum of 43,000*l.*, the amount of the settlement, which they claimed was reasonable. They did not ask for more. The plaintiffs must prove their damages. It is not enough for them to say: "We were advised to settle for "43,000*l*., we did so, and we now claim that sum". Before the court can award a sum as damages, there must be evidence on which it can act. Therefore, in a case such as this, the plaintiffs must call evidence to establish their case. If the evidence which they call satisfies the judge or jury that the settlement was a reasonable one, the damages awarded will be the amount of the settlement and the costs reasonably incurred. I do not think that any good purpose is served by calling counsel who advised the settlement to say that he did so advise, even if the evidence is admissible. It could only be followed by questions why he so advised, and that would be asking him to do the work of the judge. Moreover, the duty of the judge at the trial is to determine the damages; and the facts proved before him might be quite different from those known to counsel at the time of his advice to settle for so much. The trial judge must make up his own mind on the facts he finds proved before him. At the same time, I am far from saying that the settlement ought to be disregarded. No one can think that a person or a company will agree to pay 43,000*l*. damages lightly. It is a matter for consideration that the settlement was arrived at under advice, the more so as the party settling may be quite uncertain as to whether he can recover anything against someone else. If, upon the evidence, the judge is satisfied that the damages would be somewhere around the figure at which the plaintiffs had settled, he would be justified in awarding the settlement figure. I do not consider that it is part of his duty to examine every item in those circumstances. The plaintiffs put forward their claim and call evidence to establish it. The defendants have an opportunity of cross-examining the plaintiffs' witnesses and of calling evidence themselves. The plaintiffs must establish a prima facie case that the settlement was a reasonable one. If the defendants fail to shake that case, the amount of the settlement can properly be awarded as damages. The position is much the same, though perhaps not quite so strong, as in a case in which damages have been assessed in a suit between other parties involving the same facts. The judgment is not binding, but the court will not lightly disregard it in the absence of fresh evidence or new factors.

In this case there was before Devlin, J., some evidence, which may not have been available at the time of the settlement, that the Royal Netherlands government had over-bought to some extent. It may be that this was before the plaintiffs' advisers at the time of the arbitration, for it was clearly indicated in the

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documents. None the less, the answers did provide material on which the defendants were able to base an argument that the damages were not so high as the plaintiffs claimed. After full examination of all the evidence, I do not think it was sufficient to displace the case which the plaintiffs had set up, that this was a reasonable settlement. The question is not whether the plaintiffs acted reasonably in settling the claim, but whether the settlement was a reasonable one; and, in considering it, the court is entitled to bear in mind the fact that costs would grow every day the litigation was continued. That is one reason for saying that it is sufficient for the purpose of the plaintiffs if they satisfy the judge that somewhere around the figure of settlement would have been awarded as damages.

This view is supported by *Fisher* v. *Val de Travers* (14), where the second of the questions left by the judge to the jury had been whether the sum paid as compensation was reasonable, and the jury found that it was. In that case, in the course of the argument, Brett, J., asked counsel: " Supposing Hicks had claimed " 1,000*l.*, which, as the damages really amounted to 110*l.*, we " now know would be excessive, and the plaintiffs had paid, could " they have recovered that from the defendants? "; and counsel answered: " No, because the plaintiffs would have to show they " paid the proper compensation ". That I believe to be the test.

It is interesting to notice that, in the report of the same case in the Law Times Reports (15), in the judgment of Brett, J., there appears this passage: " As to the damages themselves, we " refused to grant a rule to the defendants to enable them to raise " the question as to their liability to repay them to the plaintiffs, " and the Court of Appeal have held that we were right in so " refusing "; so that the same question has been considered by the Court of Appeal in that case.

In *Grebert-Borgnis* v. *Nugent* (16), " Denman, J., having " found as a fact the contract and breach, and that the defendants " knew that the contract was to enable the plaintiff to fulfil his " contract with Messrs. Seppe as above stated, and that the " profit which the plaintiff lost by not fulfilling his contract with " Messrs. Seppe was 34*l.*, held that the plaintiff was entitled to " recover not only 34*l.*, but also 28*l.*, which, on the principle laid " down in *Elbinger Actien-Gesellschaft* v. *Armstrong* (17), he " assessed as a reasonable sum by way of damage for the breach

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(14) 45 L. J. (C. P.) 479; 35 L. T. 366.

(15) 35 L. T. 368.

(16) 15 Q. B. D. 85, 86.

(17) (1874) L. R. 9 Q. B. 473.

"of contract by the defendants. The learned judge therefore "gave judgment for the plaintiff for 62*l.*". The Court of Appeal held that Denman, J., had assessed the damages on the right principle. He had evidence before him and he came to the conclusion that the amount awarded in the French court of 28*l.* was a reasonable sum by way of damages.

Having for a number of days considered the evidence, I am of opinion that the plaintiffs were fortunate in being able to settle with the Royal Netherlands government at the sum of 43,000*l.* I do not think it necessary for the plaintiffs to show, as Sir Walter Monckton put it, that there was a liability of at least 43,000*l.*, though I think there was. I am satisfied that this was not only a reasonable settlement, but a good one from the point of view of the plaintiffs in this action, and I think the judge ought to have so held. The judge awarded a very much smaller sum than I should have done in respect of the 1,400 tons left on the hands of the Royal Netherlands government, and he directed an inquiry in regard to the measure of damages recoverable from the use of the faulty material. The cost of such an inquiry must be extraordinarily high, involving the employment of Dutch lawyers and others, and prolonged investigations in Holland. It would be necessary, if there were a doubt as to the wisdom and righteousness of the settlement. I am happy to think that it can be avoided. The plaintiffs have satisfied me that the settlement was proper in every sense. The damages could not have been less. The plaintiffs are entitled to judgment against the defendants for the amount of the settlement, and there is no necessity for the inquiry which the learned judge directed.

I agree that the appeal of the plaintiffs should be allowed.

BIRKETT, L.J. I have listened with the greatest care to the judgments which have just been delivered. So far as I am aware, having listened to the evidence myself over many days, they cover every material matter, and I agree with them.

Appeal allowed.

Solicitors: *Carpenters; Allen & Overy.*

A. W. G.

C. A.

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Somervell,
Denning and
Morris, L.JJ.

BOGUSLAWSKI AND ANOTHER *v.* GDYNIA AMERYKA LINIE (No. 2).

[1946 B. 273.]

Costs—Action by Polish seamen against Polish shipowners—Other actions by seamen against same and other defendants—Other actions not consolidated or tried with plaintiffs' action—Agreement by parties that evidence in plaintiffs' action to be deemed taken in other actions—Judgment for plaintiffs—Taxation of costs—Apportionment.

When, after the war, His Majesty's Government recognized the Polish Provisional Government of National Unity as the de facto government of Poland, the London Polish Government, which during the hostilities had had its headquarters in this country, agreed with the Polish officers' and seamen's trade unions that out of the moneys of three Polish shipping companies the seamen who in fact left their ships because of the change of government should receive three months' pay as a gratuity. The two plaintiffs left their ship and brought this action against the shipping company for the promised gratuity. Two similar actions had been brought by other Polish seamen, one against the same defendants and the other against another shipping company. The three actions were not consolidated, nor were they tried together; but, inasmuch as all three involved evidence of Polish law and similar questions of fact, it was agreed between the parties that evidence in the one case should be deemed to be taken in the others, the same solicitor acting for the plaintiffs in all three actions. The plaintiffs in the present action having succeeded in their claim, the defendants, on taxation of costs, objected that certain costs, in particular the brief fee and the cost of witnesses, ought to be apportioned between the three actions. The taxing master refused to apportion, but on appeal the judge reversed his decision. On appeal by the plaintiffs:—

Held, that the mere fact that the parties had agreed that evidence taken in one action should be treated as evidence in the others did not afford any basis for apportionment: it must be shown either that there was an agreement to treat the first action as a test case, or that the actions had been consolidated. The natural inference to be drawn from the agreement made was not that its purpose was to diminish the defendants' liability for costs in the first action, but that it was made in order that the costs of the other actions should be diminished with regard to both parties.

Observations of Pollock, C.B., in *Oppenshaw* v. *Whitehead* (1854) 9 Ex. 384 considered.

Per Denning, L.J. The position might well have been different if the plaintiffs in the other two cases had had their actions tried, perhaps very shortly afterwards, and had recovered judgment with costs. The solicitor would hardly be entitled to be paid three times over for the same work because he had won three actions.

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The decision of the Court of Exchequer in *Oppenshaw* v. *Whitehead*, supra, that, where two actions had been fought and won on substantially the same ground for two plaintiffs "the attorney is "entitled to the same charges as if two different attorneys had been "employed", should be regarded as of doubtful validity.

Decision of McNair, J., reversed.

APPEAL from McNair, J., in chambers.

The plaintiffs were in 1945 seamen on board the defendants' steamship *Monska Wola*, and members respectively of the Polish Officers' Union and the Polish Seamen's Union. During the last war the Polish Government moved their headquarters to London and from 1940 to 1945 exercised jurisdiction over men of Polish nationality and Polish ships, and owned 98½ per cent. of the shares of the defendant company, which managed the ships of two other Polish companies. At midnight on July 5/6, 1945, the British Government recognized the Polish Provisional Government of National Unity as the de facto government of Poland.

On July 3, 1945, the Minister of Industry, Commerce and Shipping of the London Polish Government agreed with the representatives of the two unions that out of the moneys of the shipping companies the sailors who in fact left their ships because of the change of government should receive three months' pay as a gratuity. A telegram to that effect was sent to the masters of Polish ships in British ports, and as a result second engineer Boguslawski and carpenter Krupka, the plaintiffs, left their ship on July 11 and 7 respectively. By an action begun on February 8, 1946, they each claimed three months' pay from the defendant company. Finnemore, J., gave judgment for the plaintiff Boguslawski for 175*l.* 5*s.* and for the plaintiff Krupka for 123*l.*, with interest. The defendants' appeal was dismissed by the Court of Appeal on June 15, 1950.

Two other similar actions had been set down by other seamen, one against the Gdynia Ameryka Linie and the other against Zegluga Polska Spolka Ackyjna, and were listed together with the plaintiffs' action, but were not consolidated with it. On an application before Hilbery, J., however, it was agreed between the parties that evidence in one case should be deemed to be taken in the others. The same solicitor was acting for all the plaintiffs in the three actions.

On the taxation of costs in the plaintiffs' action the defendants objected that certain costs, in particular the brief fee and the cost of witnesses, ought to be apportioned between the three actions. The last two actions had not up to that time been brought to

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trial. The master refused to apportion, but on appeal the judge reversed his decision, and made the following order: "That the "taxation of costs herein be remitted to the taxing master with a "direction to apportion certain items in the plaintiffs' bill of "costs, namely, (a) instructions for brief; (b) counsel's fees on "the trial of the action and refreshers; (c) shorthand writer's "charges; (d) attendance of expert witnesses; and (e) interpreter's fees, as between this action and the two other actions " . . .".

The plaintiffs appealed.

Niall MacDermot for the plaintiffs. There is no power to apportion unless there has been a consolidation or the costs are in respect of other actions between the same parties and one action is treated as a test case: see Ord. 65, r. 27, reg. 8, of the Rules of the Supreme Court; Daniell's Chancery Practice (8th ed.), p. 1046; *Oppenshaw* v. *Whitehead* (1); *In re Metropolitan Coal Consumers' Association* (2); and *Walker* v. *Provincial Homes Investment Co. Ld.* (3). The judge considered that the relationship between the three actions so closely approximated to consolidation that the costs should be apportioned. It is only where it has been agreed that the facts in one action shall be binding on the others that there arises a situation which can rightly be described as approximating to consolidation. If the plaintiffs get their full costs it does not follow that the plaintiffs in the other actions will also recover their full costs. No application was made for consolidation and the actions have not been treated as consolidated.

Scott Henderson, K.C., and *Robin Dunn* for the defendants. The same solicitors were acting for the plaintiffs in all the actions, and work was done by them which was common to all the actions. Order 65, r. 27, reg. 41, gives the judge a discretion, and, unless he has misdirected himself as to the rules, the Court of Appeal will not interfere with his discretion. Here work has been done once for all three actions, and it is submitted that there is ample ground on which the judge was right in saying that the exercise of his discretion was not excluded: see *Stephen* v. *Griffin* (4). If there had been no agreement between the parties to treat this as common work, the solicitors would have been entitled to charge fees in each case.

(1) (1854) 9 Ex. 384.
(2) (1890) 45 Ch. D. 606.
(3) (1910) 101 L. T. 871.
(4) [1897] 2 Q. B. 368.

SOMERVELL, L.J., stated the facts and continued:—The three actions were all set down, and on an application before Hilbery, J., the parties agreed, and the agreement is recorded in the note of the associate, that evidence in one case should be deemed to be taken in the others. There was a great deal of evidence, particularly as to Polish law, and, I dare say, evidence as to the making of this offer, which was common to all these cases, though there were other matters which might have led one to fail where others had succeeded, in particular, the time when the officer or man actually left the service of his company. The three cases came into the list before Finnemore, J., and they were all called on. For some days they were entered in the list as part heard. On the twelfth day Mr. Linton Thorp, K.C., who appeared for the plaintiffs in the first action, which was being heard, mentioned the matter to the judge, and it appears that there was some difficulty, possibly, about calling the actual plaintiffs, who would have to be called in the second and third actions. So it was agreed that those actions should stand over, and that Finnemore, J., should give his judgment in the first action.

The judge gave his judgment in favour of the plaintiffs, and the defendants appealed to the Court of Appeal and failed. They were given leave to appeal to the House of Lords on certain terms. One of the terms was in effect that they should do what they had previously refused to do, namely, regard the findings of the court with regard to Polish law in this case as governing the other cases, or any other cases which were proceeded with. I think that I have stated the conditions substantially accurately. Up to that time they had not agreed that the first case should be a test case for such matters as were common to it and the other cases, nor had these three actions been consolidated.

The same solicitor was acting for the plaintiffs in all three actions. When the bill of costs was drawn up the defendants took the objection that certain of the costs, in particular the brief fee and the cost of the witnesses, ought to be apportioned, that is to say, that the plaintiffs in the first action ought not to recover the full costs of calling the witnesses, because, it is said, broadly, that was work done on behalf of all three sets of plaintiffs, and the costs should be apportioned. One can easily see the reason for that suggestion.

I need not read the objections in full, but the master in answering them referred to three reported cases, and in particular to the following passage in the judgment of Pollock, C.B., in

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Oppenshaw v. *Whitehead* (5): " We were desirous, in cases of " this kind, to lay down some rule which would be productive of " economy in the administration of justice; but, after considering " the subject with the greatest attention, we find it impossible to " lay down any general rule which might not create more expense " in discussing its application than would probably be saved by " its adoption. We therefore think that, where the business has " been actually done, the master ought not to take into considera- " tion that the same attorney was employed by two or more " plaintiffs, unless indeed there has been a consolidation of the " actions. With respect to such matters as may be required to " be done but once for both causes, such as subpœnaing a witness, " making a journey, or the like, of course the charges must be " divided according to the discretion of the master, exercised " under the ' Directions to the Taxing Masters '. But in matters " of this description, where the business is actually done in both " causes, we think that whether the causes are tried at the same " or at a subsequent assize the attorney is entitled to the same " charges as if two different attorneys had been employed ".

In re Metropolitan Coal Consumers' Association (6), to which the master also referred, was on the face of it a very strong case for apportionment. Kekewich, J., there said (7): " If these two " cases were in any way to be regarded as governing one another, " it was for the defendants to come forward and say, ' try one: " ' and if you succeed in one, we will immediately submit, " ' without argument, to judgment in the other ' ". I would like to add, that I think that the defendants would have placed themselves in a similar position if, instead of saying " We " will immediately submit to judgment ", they had said " We " will treat the decision given in the first case as governing all " the same issues as raised in the second case ". There might be some different issue in the second case which could be distinguished and dealt with separately. The master, after one other quotation, regarded that principle as applying in the main to the objections, and refused to apportion.

From that decision the defendants appealed and the judge reversed the master. He set out the facts, and what the master had decided, and said that the decision did not, in his view, lay down any binding rule of law. He said, having regard to the agreement made, that he considered that the relationship between these actions closely approximated to consolidation, and that he was "satisfied that the bulk of the work involved in the items "which are challenged can fairly be regarded as common to all "three actions, so that, if the plaintiffs in the second and third "actions fail, it would be unfair to hold the defendants in the "first action liable for the whole of the cost of this common work "and that, on the particular facts of these cases, the position "was so closely equivalent to consolidation that apportionment "should be made".

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(5) 9 Ex. 384.

(6) 45 Ch. D. 606.

(7) Ibid. 610, 611.

With respect, I do not follow that. The defendants contested the first action. Their doing so compelled all this evidence to be called, and I cannot see why, if the second and third actions fail, which must be on some other ground, the defendants should not pay the costs which were incurred, and had to be incurred if Jan Boguslawski and Stanislaw Krupka were to bring their action. It seems to me, approaching it from a somewhat different angle—and I think Mr. Scott Henderson was inclined to agree, because nobody thought about costs when the agreement was made as to the evidence—that the natural inference when an agreement like that is made is, not that it is made in order to diminish the defendants' potential liability for costs in the first action, but that it is made in order that the costs of the second and third actions should be diminished with regard to both parties.

It was suggested that there are one or two dicta in the cases which suggest that in some circumstances a solicitor can require payment twice over for his work. When I say twice over, of course, there may be many cases where work done on one case is of some assistance in another, but that is not the type of case we are considering. In cases like this no doubt the efforts made in one case make it necessary for very much less evidence to be taken in the others. It was suggested that the plaintiffs might be entitled to recover in the second action exactly as if they had never made the efforts and recovered the costs in the first case, in respect of matters common to both. We have not to decide that today. If that is the consequence of our decision, then I think it is a matter which might well be looked into; but I doubt whether that result does follow from our decision.

For these reasons I think that the judge went wrong here and applied the wrong principle. The idea of close approximation to consolidation is a difficult one, and I do not think that it applies in a case like this. I think that in such a case it must be shown either that there was an agreement that a case should be heard as a test case or, of course, that the actions had been consolidated.

I think that the mere fact that it is agreed between the parties that evidence taken in the first action should be treated as evidence in the second and third does not afford any basis for apportionment; nor, I am clear on the authorities, can it be suggested that there is any case for apportionment here in respect of brief fees. I think that this appeal must be allowed and the order of the master restored.

Denning, L.J. It is important to notice that the first action was tried out and judgment given for the plaintiff with costs. The other two actions stood over and have never been tried. In those circumstances I see no reason why the plaintiff should not get his full costs in the action which has been tried.

The position might well have been different if the plaintiffs in the other two cases had had their actions tried, perhaps very shortly afterwards, and had got judgment with costs. I cannot myself imagine that the solicitor would be entitled to get paid money three times over for the same work because he had won the three actions. I know that in *Oppenshaw* v. *Whitehead* (8) the Court of Exchequer, consisting of Pollock, C.B., Parke and Alderson, BB., decided that, where two actions had been fought and won on substantially the same ground for two plaintiffs, "the attorney is entitled to the same charges as if two different "attorneys had been employed", in other words, that he gets paid twice over. That is not a decision of the Exchequer Chamber, but only of the Court of Exchequer, and is not binding on this court. I should not for myself, as at present advised, be inclined to agree with it; but it does not arise in this case.

I agree, for the reasons given by my Lord, that we should allow this appeal and that the plaintiff should get his proper costs.

Morris, L.J. I agree.

Appeal allowed.

Solicitors: *Constant & Constant; Hilder, Thompson & Dunn.*

A. W. G.

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(8) 9 Ex. 384.

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Somervell,
Denning and
Birkett, L.JJ.

[Plaint F. 130]

Landlord and Tenant—Agricultural holding—Notice to quit—Restrictions on operation of—Landlord's complaint of breach of covenant —Necessity for specifying reason for notice—Notice held invalid for uncertainty—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24, *sub-ss.* 1 *and* 2.

A notice to quit given by the landlord of an agricultural holding to his tenant under the Agricultural Holdings Act, 1948, need not be in any particular form, but it must state the reason why he requires possession; and that reason must be one of the reasons prescribed in the Act. In particular, if complaint is made of a breach of covenant by the tenant, the notice must make it clear whether or not the breach is capable of remedy, so that the tenant may know whether the notice is given under para. (*d*) or para. (*e*) of s. 24, sub-s. 2, of the Act.

Quære, whether the Agriculture (Control of Notice to Quit) Regulations, 1948, made in pursuance of s. 26 of the Act, compel a tenant who disputes any of the grounds stated in the notice in pursuance of s. 24, sub-s. 2, to refer the question to arbitration.

Appeal from Judge Rawlins, sitting at Launceston county court.

The plaintiff, who was the landlord of a farmhouse, cottage, buildings and land known as Kingbear, Northill, served, in September, 1949, on the defendant, who was the tenant, the following twelve months' notice to quit:—" I hereby give you " notice to quit and deliver up possession . . . on the 29th day " of September, 1950. The reason for this notice is that you " have broken the terms of your lease by cutting timber reserved " in the lease, wilful damage and neglect of my property and not " farming the land according to the terms of the said lease and " contrary to the rules of good husbandry ".

The tenant, in accordance with s. 24, sub-s. 1, of the Agricultural Holdings Act, 1948 (1), within one month from the

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(1) Agricultural Holdings Act, 1948, s. 24, sub-s. 1: " Where notice " to quit an agricultural holding or " part of an agricultural holding is " given to the tenant thereof, and not " later than one month from the " giving of the notice to quit the " tenant serves on the landlord a " counter-notice in writing requiring " that this subsection shall apply to " the notice to quit, then, subject to " the provisions of the next following " sub-section, the notice to quit shall " not have effect unless the Minister " consents to the operation thereof ".

Sub-s. 2: " The foregoing sub- " section shall not apply where . . . " (*d*) at the date of the giving of the giving of the notice to quit, served on the landlord a counter-notice in writing, claiming that the notice to quit should have no effect unless the Minister of Agriculture consented to its operation. The landlord took no steps to obtain the consent of the Minister, but brought the present action in the county court for possession of the holding.

The county court judge made an order for possession, holding that the notice to quit was a good notice under para. (*e*) of sub-s. 2 (1), so that the consent of the Minister was not necessary. The tenant appealed.

L. A. Blundell for the tenant. The question is whether the notice to quit given by the landlord is so worded that it can properly be relied on as falling within s. 24, sub-s. 2, para. (*e*), of the Agricultural Holdings Act, 1948. It does not state that the interest of the landlord in the holding has been materially prejudiced by the alleged breach, nor does it state whether or not the breach was capable of being remedied. The onus is on the landlord to establish the special matter under one or other of paras. (*d*) or (*e*) of sub-s. 2, which would deprive the tenant of the protection afforded by sub-s. 1 of s. 24, viz., to give a counter-notice claiming that the consent of the Minister must be obtained.

It is not suggested that the notice must be in any particular form or contain particular words, but, if the landlord wishes to rely on para. (*e*) of sub-s. 2, he must make it plain that the breaches of which he complains are of an irremediable type. The notice given contains nothing to indicate that. The course of action of the tenant would vary greatly according to whether the

"notice to quit the tenant had failed "to comply with a notice in writing "served on him by the landlord "requiring him within two months "from the service of the notice to "pay any rent due in respect of the "agricultural holding to which the "notice to quit relates, or within a "reasonable time or within such "reasonable period as was specified "in the notice to remedy any breach "by the tenant that was capable of "being remedied of any term or condition of his tenancy which was not "inconsistent with the fulfilment of "his responsibilities to farm in accordance with the rules of good "husbandry, and it is stated in the "notice to quit that it is given by "reason of the matter aforesaid; "(*e*) at the date of the giving of the "notice to quit the interest of the "landlord in the agricultural holding "to which the notice relates had been "materially prejudiced by the commission by the tenant of a breach, "which was not capable of being "remedied, of any term or condition "of the tenancy that was not inconsistent with the fulfilment by the "tenant of his responsibilities to farm "in accordance with the rules of good "husbandry, and it is stated in the "notice that it is given by reason of "the matter aforesaid".

notice was under para. (*e*) or para. (*d*). For the landlord it was submitted in the court below that the tenant's proper course was to demand an arbitration, and the judge found that when the Minister, under the powers vested in him by s. 26, sub-s. 1, of the Act, made the Agriculture (Control of Notices to Quit) Regulations, 1948, he was laying down the procedure to be followed by a tenant who was desirous of testing, inter alia, the landlord's claim to possession under s. 24, sub-s. 2, para. (*e*), and confined the tenant's remedy to arbitration. Section 26 is, however, permissive, and there are no words in it which expressly or by implication exclude the jurisdiction of the courts.

H. E. L. McCreery for the landlord. The Agricultural Holdings Act, 1948, cuts down the common-law rights of landlords in order to enforce the policy of the Act, which is to keep good tenants and get rid of bad ones. The displacement of bad tenants is achieved by para. (*e*) of sub-s. 2 of s. 24, which preserves to the landlord the last vestige of his common-law right to get rid of a bad tenant by serving notice to quit under that paragraph. A landlord ought not to be deprived of that last vestige of his rights because of a technicality—the omission of the words "materially prejudiced". It is submitted, and the judge has so found, that it is implicit in this notice to quit that the interest of the landlord was materially prejudiced.

[SOMERVELL, L.J. Is it made plain in this notice that the landlord is proceeding under para. (*e*) and not under para. (*d*)?]

The Act itself does not provide for any particular form of notice under this section.

[SOMERVELL, L.J. Do the regulations make arbitration compulsory?]

The judge has found that once the regulations were made arbitration was the exclusive remedy of the tenant. Section 26 provides that the Minister may make regulations for requiring any question arising under sub-s. 2 of s. 24 to be determined by arbitration. "Requiring" should be given its ordinary mandatory meaning.

Blundell replied.

SOMERVELL, L.J. This appeal raises a point under s. 24 of the Agricultural Holdings Act, 1948. [His lordship read s. 24, sub-s. 1, and sub-s. 2, paras. (*d*) and (*e*), the notice to quit, and continued:] The county court judge held that the notice to quit was a good notice under para. (*e*), and from that decision Mr.

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Blundell appeals on behalf of the tenant. I propose to consider that point first.

The main argument below, as recorded by the county court judge, appears to have turned on the submission that it was bad because the words "materially prejudiced" were not inserted in the notice. The judge rejected that contention and, in so far as he based himself on the principle that in a case of this kind, where the statute prescribes no form, one must not be technical, and it is not necessary to set out the exact words of the section or anything of that sort, I agree with him. He himself referred to a precedent for a notice under s. 24, sub-s. 2, para. (*e*), in one of the textbooks: "breach of a term or condition of the tenancy "being a breach not capable of being remedied". That formula does not contain the words "materially prejudiced", but it indicates quite plainly that it is a para. (*e*) and not a para. (*d*) case.

In my view the notice ought to make it clear under which paragraph it is sought to be served. I find it quite unnecessary to lay down what formula or formulæ in different cases would attain that end. I am not drawing up precedents, but it might be argued with success in certain cases that if the notice set out the nature of the damage it might be so plain that the damage was irremediable that the court might hold that that was itself a sufficient indication. I think it is desirable that the indication should be more express than that. I do not regard this as a technicality, because, as I have pointed out, the man who receives a notice, in considering whether it is valid or not, is entitled, in my opinion, to know with certainty by which route the landlord is seeking to evict him. If it is para. (*d*) the conditions are of one kind, and if it is under para. (*e*) they are of another kind. Take an example under (*e*): it may be that although there is an irremediable breach it would be impossible for the landlord to show that he has been materially prejudiced.

I do not think that this notice does sufficiently indicate under which paragraph it purported to be served. It refers to cutting timber, but that may be a very small matter: the landlord may not be "materially prejudiced" by it. It may in certain circumstances be regarded as being capable of being remedied; I do not know. Wilful damage and neglect might certainly cover cases where the matter could be remedied, and so could "not farming "the land according to the terms of the lease and contrary to "the rules of good husbandry". In fact the wording of both (*d*) and (*e*) contemplate that the rules of good husbandry may be broken by an act which is remediable or by an act which is irremediable. Therefore I do not think that that notice was a good one under sub-s. 2.

What the tenant did when he received that notice was to serve the counter-notice referred to in sub-s. 1. I think that the proper construction of the notice to quit, on the basis that I am right in holding that it was not a good one under sub-s. 2, is that, as the period of the year laid down by the Act was observed, it should be regarded as a notice which falls under sub-s. 1, with certain words added to explain the reason why it was served, which does not affect its legal nature. That being so, the tenant was entitled to serve the counter-notice stating: " Now I hereby " give you notice that I require that sub-s. 1 of s. 24 of the " Agricultural Holdings Act, 1948, shall apply to the said notice, " and that the said notice shall not have effect unless the Minister " of Agriculture and Fisheries consents to its operation ".

That counter-notice having been served, the landlord could have applied for the Minister's consent, but he did not so apply, and under regulations to which I shall refer for another purpose in a moment he has to do that within a month of the date of the service of the counter-notice. He admittedly did not do that, so the notice to quit is invalid, and the landlord, if he desires to get rid of his tenant and has grounds for proceeding under one or other of the sub-sections, must start again.

Another matter was raised before the county court judge which does not on this view of the case arise for decision. I would, however, like to say a word about it. It was submitted before the county court judge that the basis of the notice was sufficiently a s. 24, sub-s. 2 (*e*) notice to come within the words I am about to read. Then the county court judge held that he had no jurisdiction because under the regulations made under the Act the only remedy of a tenant who wished to dispute a notice which fell within s. 24, sub-s. 2 (*d*) or (*e*), was to proceed by arbitration. Section 26, sub-s. 1, provides: " The Minister may make regula- " tions (*a*) for requiring any question arising under subsection (2) " of section twenty-four of this Act to be determined by arbitration " under this Act "; and then there are other matters for which he can provide, which are not material for the present purpose. Under that power the Agriculture (Control of Notices to Quit) Regulations, 1948, were made. In the form in which we have them the references are to the sections as they were in the Agriculture Act, 1947; but it is common ground that they are applicable to s. 24 of the Act of 1948. They start by reciting that they are made in pursuance of sub-s. 8 of s. 31. It would now be in pursuance of s. 26 of the Act of 1948. Reg. 4 provides that in any case where it is stated in a notice to quit that the notice is given for one or more of the reasons specified in the next following regulation, it shall be open to the tenant, within one month from the giving of the notice to quit, to serve on the landlord a notice in writing requiring any question arising out of the reasons stated in the notice to quit to be determined by arbitration under the Act of 1923. The next succeeding regulation sets out in substance the provisions of paras. (*d*), (*e*) and (*b*).

The judge said: "I am, however, of the opinion that when "the Minister, under the powers vested in him under s. 26, "sub-s. 1, of the Act made regulations"—and then he referred to them—"he was laying down the procedure to be followed by a "tenant who was desirous of contesting inter alia the landlord's "claim to possession under s. 24, sub-s. 2 (*e*). It is my opinion, "and I come to it with some reluctance, that, once the Minister "in the exercise of his powers made the regulation, the tenant's "only remedy was by way of arbitration".

If I had to decide that matter, and had come to the same conclusion as the county court judge, I do not think that I would have done it with reluctance, because I think that the intention of the Act, to be gathered from its terms, and with regard to this particular subject-matter, would appear to be that these agricultural technical matters with regard to breaches of good husbandry, and so on, should be decided, and decided rapidly, under an arbitration procedure, by persons who are familiar with the technical points involved.

Mr. Blundell submits that, on the regulations as they are framed, the county court judge was wrong. He says that there are no words which expressly state that the arbitration procedure is the only procedure; there are no words which expressly or by necessary implication exclude the jurisdiction of the court. The words "it shall be open to the tenant" are certainly consistent with arbitration being the exclusive remedy, but I do not think that the argument that the courts are not open can be based on those words. There is an absence of any clear provision making arbitration the only procedure.

Mr. McCreery relies—and there is force in this—on the fact that the section contemplates regulations which will require certain matters to be referred to arbitration. As I have said, it is not necessary for us to decide this point, and I desire to express no final conclusion on it. I wanted to say what I have said because it seems to me plain that there is at any rate a question, which would require careful consideration, whether the county court judge was right in the conclusion to which he came. If, as seems to be likely, it was intended, and perhaps the majority of people concerned desire, that matters of this kind should be settled by arbitration, those who are concerned with the making of these regulations, and their possible amendment from time to time, might well consider whether it would be desirable, if that is their intention, to use words which would prevent the argument being raised in later cases.

I think that this appeal must be allowed and the order for possession set aside.

DENNING, L.J. If the landlord of an agricultural holding wishes to give his tenant notice to quit, he should get some good advice on the matter, because there are now many legal requirements which he has to fulfil before his notice will be good. In particular, he must state in his notice the reason why he requires possession, and that reason must be one of the reasons prescribed in the Act of Parliament. I do not think that the notice need be in any particular form, but it must at least make it clear what his reason is. In particular, when he complains of a breach of covenant which may, or may not, be capable of remedy, he must make it clear which it is, so that the tenant may know whether the notice is given under sub-para. (*d*) or (*e*). The notice of September 27, 1949, does not do that. It does not make it clear under which sub-section it comes. It is therefore not a good notice.

On the other point I agree with what my Lord has said. I can well see that it is desirable that a dispute on the validity of the reason for the notice should be referred to arbitration quite quickly, so that the parties can know their rights without waiting until the end of the year's notice. The Minister could have made regulations to ensure a speedy determination of the matter. He could have required the question to be determined by arbitration, but unfortunately he did not do so. The regulations which he has made seem to make arbitration permissive and not compulsory. If the tenant has it in his option to go to arbitration or not, it may well mean that he can wait till the end of the year's notice and then dispute the validity of the reason for it in the courts. If he is to be deprived of this right, the regulations should make it clear. At present they do not do so. I agree

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that the appeal should be allowed on the point that the notice was invalid.

BIRKETT, L.J. I agree. As our decision has already been announced on the first point it is not necessary to express a view on the second, but they are both in my view important points. The first was concerned with the adequacy of a notice to quit under the Act. It is quite plain from reading the Act how very important the designers of the legislation thought the notice to quit and its contents were, because in sub-s. 2, at the conclusion of every single one of the paragraphs, one finds words such as these " and it is stated in the notice that it is given by reason " of the matter aforesaid ". It is to be observed that reg. 5 of the Agriculture (Control of Notices to Quit) Regulations, 1948, states that: " the preceding regulation "—concerning arbitration —" shall not apply where it is stated in the notice to quit that it " is given for one or more of the following reasons ", and then (*d*), (*e*) and (*b*) of s. 24, sub-s. 2, are most carefully set out. Therefore it is a very important matter to see what the notice contains; and I agree that it is essential that, if the notice is to be given under para. (*d*), that should be plainly stated. If it is to be given under para. (*e*) it is equally clear that that must be specified. I quite agree that it is not necessary that precise and formal language should be used, specifying particular subsections or matters of that kind, so long as the particular matter is made clear in the notice to quit without any ambiguity. I am of the opinion that the notice here was defective and invalid on the ground that it failed to do what I think the Act of Parliament enjoins.

I regard the other point also as extremely important. For my own part I am rather glad to think that it is not necessary to express a decided view on it here. It is impossible, I think, to read the Act and the regulations without realizing that it was the design that these matters should be determined by arbitration; and it is unfortunate that the Act in s. 26 uses language which is really irreconcilable with the regulations themselves. For example, s. 26 provides: " The Minister may make regula- " tions (*a*) for requiring any question arising " and so on and so on. The odd thing is that when the regulation itself is made that selfsame word " requiring " is used; but it is used in rather a different context, for reg. 4 says: " it shall be open to the " tenant " to serve on the landlord a notice in writing requiring any questions arising out of the reasons stated in the notice to

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quit to be determined by arbitration. The use of those words "it shall be open to the tenant" certainly lends colour to the view that it was a permissive power; that it was not complete and final; and that if he failed to adopt it he was not therefore utterly without remedy. Upon this second point I share the view of my Lord that it would be well that, if there be ambiguity here, that ambiguity should be removed.

Appeal allowed.

Solicitors: *Ellis & Fairbairn; Gibson & Weldon, for Peter, Peter & Sons, Launceston.*

A. W. G.

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[1948 C. 2433.]

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Jan. 15, 16, 24, 25;
Feb. 15.
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Negligence—Res ipsa loquitur—Liability of hospital for negligence of medical staff—National Health Service Act, 1946 (9 & 10 *Geo.* 6, *c.* 81).

A hospital authority is liable for the negligence of doctors and surgeons employed by the authority under a contract of service arising in the course of the performance of their professional duties.

Gold v. Essex County Council [1942] 2 K. B. 293 considered and applied.

Per Denning, L.J. The hospital authority is liable for the negligence of professional men employed by the authority under contracts for services as well as under contracts of service. The authority owes a duty to give proper treatment—medical, surgical, nursing and the like—and though it may delegate the performance of that duty to those who are not its servants, it remains liable if that duty be improperly or inadequately performed by its delegates.

The plaintiff entered a hospital for an operation on his left hand, which necessitated post-operational treatment. While undergoing that treatment he was under the care of the surgeon who performed the operation, who was a whole-time assistant medical officer of the hospital, the house surgeon and members of the nursing staff of the hospital, all of whom were employed under contracts of service. At the end of the treatment it was found that his hand had been rendered useless. The trial judge dismissed his action for damages for negligent treatment which he brought against the hospital on the ground that he had failed to prove any negligence. On appeal:—

Held, that, in the circumstances, the doctrine of res ipsa loquitur applied, and the onus lay on the hospital authority to prove that there had been no negligence on its part or on the part

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

of anyone for whose acts or omissions it was liable, and that onus had not been discharged.

Hillyer v. *St. Bartholomew's Hospital* [1909] 2 K. B. 820, and *Collins* v. *Hertfordshire County Council* [1947] K. B. 598 considered.

APPEAL from Streatfeild, J., sitting at Liverpool Assizes.

The plaintiff, a general labourer, was early in 1948 suffering from a contraction of the third and fourth fingers of his left hand, which his panel doctor diagnosed as Dupuytren's contraction. The doctor sent the plaintiff to Walton Hospital, Liverpool, where he was seen by a Dr. Fahrni, who was a whole-time assistant medical officer of the hospital. He confirmed the diagnosis and recommended an operation, which he personally performed on April 8, 1948. After such an operation the patient's hand and lower arm have to be kept rigid in a splint for eight to fourteen days, and while the plaintiff was undergoing this treatment he was under the care of Dr. Fahrni, Dr. Ronaldson, the house surgeon of the hospital, and the hospital's nursing staff. After some fourteen days the plaintiff's hand was released from the splint, when it was found that the hand was to all intents and purposes useless: both the fingers which had been operated on were bent and stiff and the trouble had affected the two good fingers, and after two unsuccessful manipulative operations all attempts to remedy the condition were abandoned.

The plaintiff in this action alleged that he had been negligently treated after the operation. The action had originally been brought against the Liverpool Corporation as owning and controlling the hospital, but later by virtue of s. 6 of the National Health Service Act, 1946, the Ministry of Health were substituted as defendants. The Ministry denied that Dr. Fahrni or any of the staff were guilty of negligence and denied that they were responsible for any negligence on the part of Dr. Fahrni, but brought him in as third party. The third party denied negligence.

At the trial, Streatfeild, J., gave judgment for the defendants on the ground that the plaintiff had failed to prove negligence on the part of any of the hospital staff. He gave no decision on the question whether Dr. Fahrni was a servant or agent of the Ministry, or whether, if he were, the Ministry would be liable for his negligence.

The plaintiff appealed.

Sir Noel Goldie, K.C., and *Burrell* for the plaintiff. At the outset only two of the plaintiff's fingers were affected; all four

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are now useless. There must have been negligence in treating the condition—res ipsa loquitur. The defendants called no evidence to show that such a disaster could occur without negligence or that it had ever done so before. They are responsible whether the negligence was that of Dr. Ronaldson, their house surgeon, or of their nursing staff, or of Dr. Fahrni, their whole-time assistant medical officer, or of the defendants themselves in respect of their system. The dicta of Farwell, L.J., in *Hillyer* v. *St. Bartholomew's Hospital* (1) as to duties inside an operating theatre do not apply—the operation itself is not complained of here. *Gold* v. *Essex County Council* (2) established the defendants' liability for their nurses, but left the position of Dr. Fahrni (and perhaps of Dr. Ronaldson) undecided. The ratio decidendi of that case applies to them both. As to Dr. Ronaldson in particular, see the judgment of Hilbery, J., in *Collins* v. *Hertfordshire County Council* (3). Both doctors were under contracts of service.

G. Glynn Blackledge, K.C., and *C. W. B. Rankin* for the defendants. The first question is whether there is any sufficient proof as to the cause of the plaintiff's resulting disability, and, if so, what is the probable cause. On a detailed analysis of the evidence of Dr. Fahrni it must be admitted that the probable cause was interference with the circulation of the blood in the hand or fingers. But, secondly, even if such were the cause, in an operation requiring a type of splinting which necessarily interfered in some degree with the circulation in the hand, can it be said to be evidence of negligence on the part of anyone if, through excessive care to maintain the splinting securely, some undue interference with the blood supply takes place and damage is caused? The fact that the damage following from tightness proved to be serious does not lead to an inference of negligence. Thirdly, even if there was negligence, there is no evidence that the defendants' system of treatment was wrong. The negligence may have been that of (a) the operating surgeon, Dr. Fahrni, in originally applying the splint; (b) the sister in the operation room who assisted in the first fixing of the splint and bandages; (c) the nurses in failing to report complaints by the plaintiff that he was in exceptional pain; (d) the house surgeon, Dr. Ronaldson, in failing to loosen the splint when he was told of the pain four days after the operation. It is quite uncertain on the evidence whose

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(1) [1909] 2 K. B. 820.
(2) [1942] 2 K. B. 293.
(3) [1947] K. B. 598.

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act or omission may have been the cause of the damage. For the maxim res ipsa loquitur to be applicable at all the facts must point to negligence on the part of the Ministry or of some person for whose acts the Ministry, as the hospital authority (or their predecessors in title), were responsible.

If the facts might equally point to negligence on the part of a person for whose acts the defendants were responsible or of a person for whose acts they were not responsible, the doctrine of res ipsa loquitur could not apply to a claim against the defendants: *Cole* v. *De Trafford* (*No.* 2) (4). But when the cause of an injury is ascertained the doctrine of res ipsa loquitur does not apply. The inquiry for the court is whether that cause was due to the negligence of the defendants or of any person for whom they are responsible: *Langham* v. *Wellingborough School* (5); *Ballard* v. *North British Ry.* (6).

Further there is no evidence as to the stage at which damage occurred; and the records show that any complaints of pain were reported by the administration nursing staff to the qualified surgeon on duty. There was therefore no lapse on the administration side. The evidence was that the nursing staff could not interfere with the splint and dressings, their duty being merely to report to the qualified surgeon on duty. If there was negligence it was a matter of inadequate medical treatment, and not of inadequate administration.

Those who run and control a hospital are not liable for the negligence of qualified doctors or surgeons: *Evans* v. *Liverpool Corporation* (7); *Hillyer* v. *St. Bartholomew's Hospital* (8); *Strangways-Lesmere* v. *Clayton* (9); *Lindsey C. C.* v. *Marshall* (10). The radiographer in *Gold* v. *Essex County Council* (11) was not a qualified medical man. The Scottish courts follow the rule in *Hillyer's* case (12): see *Lavelle* v. *Glasgow Infirmary* (13); *Reidford* v. *Aberdeen Magistrates* (14). Dicta to the contrary in *Gold's* case were obiter as regards qualified doctors and surgeons. In *Collins* v. *Hertfordshire County Council* (15) the so-called "house surgeon" for whose negligence the defendants

(4) [1918] 2 K. B. 523.
(5) (1932) 101 L. J. (K. B.) 513.
(6) 1923 S. C. (H. L.) 43.
(7) [1906] 1 K. B. 160.
(8) [1909] 2 K. B. 820.
(9) [1936] 2 K. B. 11.
(10) [1937] A. C. 97.
(11) [1942] 2 K. B. 293.
(12) [1909] 2 K. B. 820.
(13) 1931 S. C. (H. L.) 34; 1932 S. C. 245.
(14) 1933 S. C. 276.
(15) [1947] K. B. 598.

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were responsible, was an unqualified medical student; and, further, the defendants' administrative system was faulty, so that the present point did not arise for decision.

The statute empowering the defendants to own and administer the hospital is the Public Health Act, 1936, the material sections being 171, 181 and 184. The power is to provide hospital accommodation, clinics, dispensaries, out-patients' departments and maternity homes. The power under s. 184 to recover the expenses based partly on the cost of "treatment" does not operate to alter the previous common law position as to the nature of the contract between the hospital and its qualified doctors and surgeons. In the present case the contract was at a salary, but it is contended that it was not a contract of service but a contract for services. If the negligence might have been that of the operating surgeon, or the house surgeon (for neither of whose acts in the exercise of their professional care and skill would the defendants be responsible, it is contended), or might equally have been that of the nurses, then the defendants are not liable. A fortiori, the defendants are not liable if the material act or omission was on the evidence more probably that of a qualified surgeon in the exercise of his skill and judgment as such. In this case the evidence of the orthopædic surgeon, Dr. Fahrni, was that although he was on a salary he did not consider himself as under the control of the hospital in respect of his methods of treatment, or other purely technical matters in the exercise of his professional skill; and his evidence was accepted by the trial judge.

Basil Nield, K.C., and *J. S. Watson* for the third party, Dr. Fahrni.

Cur. adv. vult.

February 15. The following judgments were read:—

SOMERVELL, L.J. The plaintiff sues the defendants for damages for negligence. The judge found for the defendants, and the plaintiff appeals. A third party has been cited by the defendants, but the judge, having found for the defendants, did not consider the issue as between these parties.

The plaintiff, a general labourer, now some fifty-nine years of age, was suffering in the early part of 1948 from a contraction of his third and fourth fingers. He consulted his panel doctor, Dr. Flanagan. Dr. Flanagan diagnosed the condition as Dupuytren's contraction. He sent the plaintiff with a note to Walton

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Hospital for examination. Here the plaintiff was seen by a Dr. Fahrni, the third party in these proceedings. Dr. Fahrni was a whole-time assistant medical officer of the Walton Hospital. That hospital was at that date a hospital of the City of Liverpool, the original defendants to these proceedings. By reason of s. 6 of the National Health Service Act, 1946, it is common ground that the Ministry of Health have been properly substituted as defendants. Dr. Fahrni was a Canadian who had graduated in Canada in 1940. In 1941 he joined the Canadian Army and came to this country in 1942 or early in 1943. He had at the material dates specialized to a considerable extent in orthopædic surgery, in military hospitals and elsewhere. In this country he had received the F.R.C.S. at Edinburgh. No attack is made on his qualifications, or general competence.

Dr. Fahrni confirmed Dr. Flanagan's diagnosis and recommended an operation. The plaintiff agreed to the operation. It was carried out on April 8, 1948. The operation involves in the ordinary course the hand and lower arm being kept rigid in a splint for about eight to fourteen days. When the plaintiff's hand was finally released after some fourteen days, the condition of all the four fingers was very bad indeed. Its condition then and its final result at the time of the trial are described by the judge who saw the hand in the following sentence: "Afterwards "when it was released, unhappily a very serious state of affairs "was revealed, because not only were the two fingers which had "been operated upon almost completely stiff but the trouble "appeared to have spread to the other two good fingers as well, "and the result now is that after two manipulative operations "and after very much pain, some of which the plaintiff still "endures, this unhappy man is now in the position of having a "left hand which is completely useless to him". Apart from the two manipulative operations, the plaintiff attended as an out-patient down to January, 1949.

I have gone straight to the result because, in my opinion, on the basis that the hospital was responsible for all those in whose charge the plaintiff was, the surgeon, doctor, and nurses, the result seems to me to raise a case of res ipsa loquitur: a jury would have been entitled to find negligence on the facts as I have stated them. As will appear, it is disputed whether the defendants were responsible for the surgeon and house doctor. The judge who found for the defendants considered the matter in his judgment on the basis that the defendants were so responsible, reserving to them the right to raise the further point if it arose on his decision. In the result it did not. I propose to consider the issue first on the same basis as the judge.

The relevant allegations of negligence may be summarized as follows: first, that the hand was bandaged too tightly and so caused the damage; second, that no heed, or no sufficient heed was paid to the plaintiff's complaints that he was suffering intense and excessive pain; third, that the splint should have been loosened or the hand inspected. The third is in effect particularizing the action which should have been taken as the result of his complaints of pain. It was not disputed that the plaintiff made complaints of intense pain from the outset and throughout the period.

It will be seen that it is not alleged that the operation itself was negligently conducted. [His Lordship examined the evidence, and continued:] It is a difficult case. It seems to me impossible on the evidence to come to any clear conclusion as to why this happened. If, as I think, the result is prima facie evidence of negligence at some stage, the defendants have failed to rebut this inference. This conclusion is supported by what seems to me the remarkable fact that no independent person of experience was called. This is all the more remarkable in that Dr. Fahrni's evidence had been taken on commission so he was not able to deal with points which emerged more clearly in the light of the plaintiff's evidence. I have therefore come to the conclusion that the prima facie evidence of negligence at some stage has not been rebutted, and that the plaintiff must succeed if the defendants are liable for the negligence of all those in whose care he was.

The question whether the defendants are so responsible depends in the first instance on examination of the decision of this court in *Gold* v. *Essex County Council* (16). To appreciate the problem it is necessary to go back to *Hillyer* v. *St. Bartholomew's Hospital* (17). That case is fully analysed and considered in *Gold's* case (16), and it is unnecessary to repeat in any detail all that is there set out. In *Hillyer's* case (17), Kennedy, L.J., expressed the view (18) that a hospital though responsible for the exercise of due care in selecting its professional staff, whether surgeons, doctors or nurses, was not responsible if they or any of them acted negligently in matters of professional care or skill. The other reasoned judgment, that of Farwell, L.J.,

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(16) [1942] 2 K. B. 293.

(17) [1909] 2 K. B. 820.

(18) Ibid. 829.

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was based on narrower grounds. The Court of Appeal decided in *Gold's* case (19), after considering authorities, including dicta in the House of Lords, that Kennedy, L.J.'s statement, so far as it related to nurses, or those in the position of nurses, should not be followed. The question of doctors on the hospital staff did not directly arise in *Gold's* case (19).

In *Hillyer's* case (20) the plaintiff was injured in the operating theatre while under examination. A Mr. Lockwood, a consulting surgeon attached to the hospital, was in charge. Two other surgeons, one described as a house surgeon, were present, and also an anæsthetist and nurses. The plaintiff relied on the fact that his arm was burnt and injured while he was under examination. In the earlier part of his judgment Farwell, L.J. (21), expressed the view that all the surgeons and the anæsthetist concerned were clearly not servants of the hospital so as to make the hospital liable for any professional negligence, and he held that in the operating theatre nurses ceased to be servants of the hospital as the operating surgeon alone was there entitled to give orders. In a later part of his judgment he based his decision alternatively on the fact that the plaintiff had not shown that the negligence was not that of "the surgeon", presumably referring to Mr. Lockwood for whom the hospital were plainly not liable. It may be that he had in mind all the surgeons but this part of the judgment would stand if it was only Mr. Lockwood for whom the hospital was not liable. In *Smith* v. *Martin* (22), Farwell, L.J., seems to have treated this latter ground as the real reason for his decision.

As in *Gold's* case (23) the court preferred Farwell, L.J.'s judgment, it is necessary to see whether they regarded this statement to which I have referred with regard to all the surgeons and the anæsthetist from the first part of his judgment as part of the ratio decidendi. I think it is clear that they did not regard it as deciding the position with regard to those on the permanent staff of the hospital.

With regard to the position of surgeons or doctors, Lord Greene, M.R., said in *Gold's* case (23) that the relationship of a consulting surgeon or physician precludes the drawing of an inference that the hospital authorities are responsible for their negligent acts. He treats the position of a house physician or surgeon as open. MacKinnon, L.J., said that the senior surgeon,

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(19) [1942] 2 K. B. 293.
(20) [1909] 2 K. B. 820.
(21) Ibid. 825.
(22) [1911] 2 K. B. 775, 784.
(23) [1942] 2 K. B. 293.

Mr. Lockwood, was certainly not a servant of the hospital, the others probably not. Goddard, L.J., said that he was not considering the position of doctors on the permanent staff: that must depend on whether there was a contract of service and the facts of any particular case.

The evidence as to Dr. Fahrni's position is that he was an assistant medical officer: that he received a sum in lieu of residential emoluments which indicates that, if there had been accommodation, or perhaps if he had been a bachelor, he would have lived in; and that he was in whole-time employment. His engagement was subject to the standing orders of the council, but these are not before us. Dr. Ronaldson was a house surgeon working under Dr. Fahrni.

The first question is whether the principles as laid down in *Gold's* case (23) cover them. In considering this, it is important to bear in mind that nurses are qualified professional persons. It is also important to remember, and ~~MacKinnon, L.J.~~, in *Gold's* case (23) emphasized this, that the principle respondeat superior is not ousted by the fact that a "servant" has to do work of a skilful or technical character, for which the servant has special qualifications. He instanced the certified captain who navigates a ship. On the facts as I have stated them, I would have said that both Dr. Fahrni and Dr. Ronaldson had contracts of service. They were employed, like the nurses as part of the permanent staff of the hospital. In *Gold's* case (23), ~~Lord Greene, M.R.~~, in considering what a patient is entitled to expect when he knocks ~~at~~ the door of the hospital, comes to the conclusion that he is entitled to expect nursing, and therefore the hospital is liable if a nurse is negligent. It seems to me the same must apply in the case of the permanent medical staff. A familiar example is an out-patients' ward. One may suppose a doctor and a sister dealing with the patients: it seems to me that the patient is as much entitled to expect medical treatment as nursing from those who are the servants of the hospital. I agree that, if he is treated by someone who is a visiting or consulting surgeon or physician, he will be being treated by someone who is not a servant of the hospital: he is in much the same position as a private patient who has arranged to be operated on by "X".

Hilbery, J., in *Collins* v. *Hertfordshire County Council* (24), found that there had been negligence on the part of a house surgeon and a surgeon who had undertaken part-time attendance

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(23) [1942] 2 K. B. 293.

(24) [1947] K. B. 598.

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at the hospital. He found the defendants liable by reason of a negligent system but he considered the question of the defendants' liability for the surgeons. He found that they were liable for the negligence of the house surgeon. He thought on the whole that they were not liable for the part-time surgeon, but his exact relationship to the hospital was obscure. As will be seen, I agree with his conclusion as to the house surgeon whom he regarded as covered by the ratio decidendi in *Gold's* case (25).

In considering the distinction to be drawn between a contract of service and a contract for services, he referred to *Simmons* v. *Heath Laundry Co.* (26). In that case the question of what constituted a contract of service was considered by this court in relation to the Workmen's Compensation Act, 1906. Hilbery, J., referred to the citation by Buckley, L.J., in *Simmons'* case (26) of a statement by Bramwell, L.J., in *Yewens* v. *Noakes* (27) that " a servant is a person subject to the command of his master " as to the manner in which he shall do his work ". Hilbery, J., summarized the distinction in this way (28): " In the one case " —a contract for services—" the master can order or require what " is to be done, while in the other case "—a contract of service— " he can not only order or require what is to be done but how " it shall be done ". With respect, I think that in the first case the word " master " is inappropriate, and the later test would I think if applied in the ordinary meaning of the words exclude many cases where the relationship of master and servant clearly exists. To take the example given by MacKinnon, L.J., in *Gold's* case (29) of a certified master of a ship: the owner can, of course, tell him where to go, but not how to navigate.

Buckley, L.J., later in his judgment in *Simmons'* case (30), referred to a football player who, though under a contract of service had in certain respects to exercise his own judgment uncontrolled by anybody. Later he put various tests, one of which I find difficult. He gave this test for a contract for services (31): " Was he employed to exercise his skill and achieve " an indicated result in such manner as was most likely to ensure " success? ". These words would seem to cover the ship's master —an engine driver, and many who are admittedly servants. Later, he said, and one perhaps cannot get much beyond this:

(25) [1942] 2 K. B. 293.
(26) [1910] 1 K. B. 543.
(27) (1880) 6 Q. B. D. 530, 532.
(28) [1947] K. B. 598, 615.
(29) [1942] 2 K. B. 293.
(30) [1910] 1 K. B. 543.
(31) Ibid. 553.

" Was his contract a contract of service within the meaning which " an ordinary person would give to the words?".

Simmons' case (30) was concerned with a claim by a girl aged nineteen years who was admittedly employed by the defendants in their laundry and was entitled to workmen's compensation. She also gave music lessons, and the question was whether these earnings could be taken into account. This was held to depend on whether qua music mistress she was under a contract of service. The county court judge held that she was not, and the Court of Appeal held there was evidence on which he could so find. Fletcher Moulton, L.J., referred to masters in a boarding school as plainly under contracts of service. At the other end of the scale, he held that where a person goes to a music or singing master for lessons, it would be absurd to hold that the person giving the lessons was the servant of the person taking them. He said that between these two cases lie an infinite number of intermediate cases where the special circumstances point towards one conclusion or the other. He added that in his opinion it was impossible to lay down any rule of law distinguishing the one from the other. " It ~~is a question of fact to be decided by all the circumstances of the case~~ " (32).

I have thought it right to refer to these passages because they seem to me to indicate that the test as set out by Hilbery, J., might if applied literally and generally lead to results which are not in accordance with the law generally and as laid down in that case.

In my opinion the appeal should be allowed. The judge reserved to the third party the right to call further evidence if and when the defendants were held liable to the plaintiff. I think, with respect, that it might have been better in this case if the judge had had all the evidence called at the trial. If, however, the defendants desire to proceed with their claim against the third party, that issue must be the subject of a further trial. There must in any case be a fresh hearing on the question of damages.

Singleton, L.J., stated the facts, and continued:—In such circumstances it lies upon the defendants to show that the damage occurred without negligence on their part—" Where the " thing is shown to be under the management of the defendant " or his servants, and the accident is such as in the ordinary

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(32) [1910] 1 K. B. 543, 549.

"course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care": see *Scott* v. *London and St. Katherine Docks Co.* (33) and *Byrne* v. *Boadle* (34).

I do not overlook the words of Farwell, L.J., in *Hillyer* v. *St. Bartholomew's Hospital* (35), approved by Lord Greene, M.R., in *Gold* v. *Essex County Council* (36): "But even if the nurses and carriers were persons for whose negligence the defendants would be liable, the plaintiff would still fail, because it is clear that they are not liable for the negligence of the surgeon. The plaintiff has to prove his case against the defendants, but he does not do so by showing that he has been injured by the negligence of A, B, C and D, or of one of them, when the defendants are liable for the negligence of C and D only, and not for that of A and B. He must prove that the defendants are liable, and does not do so by showing that if C and D were the negligent persons they would be liable, but if it is A and B, then they are not. He must prove affirmatively that the negligence was that of the persons for whom the defendants are liable".

In that case Dr. Hillyer's arm was burned when he was on an operating table: the examination was conducted by a consulting surgeon attached to the hospital; it was admitted that the relationship of master and servant did not exist between the defendants and the consulting surgeon. Farwell, L.J., assumed (37) that the nurses and carriers were servants of the defendants for general purposes, but added, "as soon as the door of the theatre or operating room has closed on them for the purposes of an operation . . . they cease to be under the orders of the defendants, and are at the disposal, and under the sole orders of the operating surgeon until the whole operation has been completely finished: the surgeon is for the time being supreme and the defendants cannot interfere with or gainsay his orders".

This case is quite different on the facts. Dr. Fahrni was a full-time employee of Liverpool Corporation. He was appointed assistant medical officer at the hospital on December 3, 1947. He was allowed to live out and he was given a sum in lieu of residential emoluments. His engagement was subject to the standing orders of the council. No doubt the corporation could not interfere with him in the operating theatre even if they had wished to do so, but I know of nothing to prevent them making rules as to visiting, or seeing, patients after an operation, or as to the passing on of information or of complaints, or as to what should be done if the surgeon is absent.

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(33) (1865) 3 H. & C. 596, 601.
(34) (1863) 2 H. & C. 722.
(35) [1909] 2 K. B. 820, 829.
(36) [1942] 2 K. B. 293.
(37) [1909] 2 K. B. 820, 827.

The case for the plaintiff, as put by Sir Noel Goldie, did not set up negligence with regard to the operation itself, but with regard to the post-operational treatment. I do not think that the words of Farwell, L.J., to which I have referred can be applied to the facts of this case. The plaintiff was in the care of the hospital authorities: those responsible for the post-operational treatment were all full-time employees of the corporation, and it seems to me that it is not necessary for the plaintiff to establish precisely which individual employee was negligent. He made out a prima facie case of negligence against the defendants. In such circumstances they may be able to rebut that case by showing that there was no negligence or that the negligence was on the part of someone for whose acts they are not responsible. I do not agree with the submission of Mr. Blackledge that if the negligence may have been that of Dr. Fahrni, the defendants are entitled to succeed. This submission was based on two grounds: (1.) that Dr. Fahrni was in the same position as was the consulting surgeon in *Hillyer's* case (38), and (2.) that Farwell, L.J., made it clear that in his view the plaintiff in that case had to prove that the negligence was of an individual for whom the defendants were responsible. I have dealt with the second point, and it is now necessary to look into the position of Dr. Fahrni in a little more detail.

I do not find that his duties are laid down further than in the resolution of the health committee approved by the council on December 3, 1947, and in the letter of December 4, notifying him of his appointment. In *Hillyer's* case (38) Farwell, L.J., was of the opinion that it was impossible to contend that the consulting surgeon, or the acting assistant surgeon, or the acting house surgeon, or the administrator of anæsthetics, or any of them, were servants in the proper sense of the word: he assumed that nurses and orderlies might be. Kennedy, L.J., appears to have considered that the hospital was not responsible for the negligence of its professional staff in matters of professional care or skill, and to have included nurses in the term professional staff, though he indicated that the hospital authorities were legally responsible to patients for the due performance by their servants within the hospital of their purely ministerial or administrative duties such as attendance of nurses in the wards, the summoning of medical aid in cases of emergency and the like. It is, I think, of first importance to remember that the court in that case was dealing with something which happened in the operating theatre when the consulting surgeon was in charge. The court did not decide that hospital authorities can never be responsible for the negligence of a doctor.

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(38) [1909] 2 K. B. 820.

Hillyer's case (38) has been considered by the courts on many occasions. In *Lindsey County Council* v. *Marshall* (39) Mrs. Mary Marshall, who contracted puerperal fever in a maternity home, was held entitled to recover damages against the county council on the ground that there was evidence on which the jury might find that the defendants ought to have known that the home was dangerous and had failed to take reasonable steps to prevent damage to the plaintiff from the danger.

Lord Hailsham, L.C., said (40): "But it was contended on "behalf of the appellants that even if there was negligence in "continuing to admit new patients, and in not informing them "of the facts, the responsibility rested upon Dr. Campbell and "Dr. Scott and the defendants are not liable in law. I am unable "to accept that view of the law". Lord Hailsham further said (41): "I can see no difference in principle between the "employment of a doctor to advise on medical questions and the "employment of any other skilled person to advise upon other "questions".

I quote two passages from the speech of Lord Wright in that case. He said (42): "In my judgment the facts in this case are "to be distinguished from those in *Hillyer's* case (43). It is not "necessary to express here any opinion one way or the other "about the correctness of that decision. That can be reserved "until it comes, if it ever does, before this House: and the same "may be said of *Evans* v. *Liverpool Corporation* (44), which "presents some differences from *Hillyer's* case (43). Nor is it "necessary to consider what difficulties may arise in delimiting "the respective frontiers of ministerial or administrative duties "on the one hand and matters of professional care or skill on the "other hand, if it ever becomes necessary to apply the distinction

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(38) [1909] 2 K. B. 820.
(39) [1937] A. C. 97.
(40) Ibid. 106.
(41) Ibid. 107.
(42) Ibid. 124.
(43) [1909] 2 K. B. 820.
(44) [1906] 1 K. B. 160.

"which Kennedy, L.J., draws". Lord Wright further said (45): "It is not necessary to add that in all these matters not only the "matron and nurses but the medical officers were in my opinion "the servants of the appellants, as Lawrence, J., ruled. The "fact that the appellants necessarily relied on their knowledge "and judgments does not the less render them the appellants' "agents to carry out the responsibility which rested on the "appellants as operating the home".

In *Gold* v. *Essex County Council* (46) the Court of Appeal held that a local authority carrying on a public hospital owes to a patient the duty to nurse and treat him properly, and is liable for the negligence of its servants even though the negligence arises while a servant is engaged on work which involves the exercise of professional skill on his part. The plaintiff was injured through the negligence of a competent radiographer, who was a whole-time employee, and the plaintiff recovered damages against the local authority. Lord Greene, M.R., said (47): "But in each "case the first task is to discover the extent of the obligation "assumed by the person whom it is sought to make liable. Once "this is discovered it follows of necessity that the person accused "of a breach of the obligation cannot escape liability because he "has employed another person, whether a servant or agent, to "discharge it on his behalf, and this is equally true whether or "not the obligation involves the use of skill. It is also true that, "if the obligation is undertaken by a corporation, or a body of "trustees or governors, they cannot escape liability for its breach, "any more than can an individual, and it is no answer to say that "the obligation is one which on the face of it they could never "perform themselves".

In the present case was there not an obligation on the hospital to provide the plaintiff with competent, or proper, post-operational treatment? Lord Greene, in *Gold's* case, said (48) that the nature of the work of consulting physicians and surgeons and the relationship in which they stood to the defendants precluded the drawing of an inference that the defendants were responsible for their negligent acts, and he added: "The same may be true of "house physicians and surgeons, but their case is not relevant to "the present inquiry and I say nothing about it. The position "of nurses again, although, no doubt, analogous, is not strictly "relevant, but if the nature of their employment, both as to its

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(45) [1937] A. C. 97, 125.
(46) [1942] 2 K. B. 293.
(47) Ibid. 301.
(48) Ibid. 302.

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"terms and as to the work performed, is what it usually is in "such institutions, I cannot myself see any sufficient ground for "saying that the defendants do not undertake towards the patient "the obligation of nursing him as distinct from the obligation of "providing a skilful nurse. Nursing, it appears to me, is just "what the patient is entitled to expect from the institution and "the relationship of the nurses to the institution supports the "inference that they are engaged to nurse the patients". Later Lord Greene said (49): "It is clear, therefore, that the powers "of the defendants include a power of treating patients, and "that they are entitled, and, indeed, bound in a proper case, to "recover the just expense of doing so. If they exercise that "power, the obligation they undertake is an obligation to treat, "and they are liable if the persons employed by them to perform "the obligation on their behalf act without due care".

MacKinnon, L.J., said (50) that the radiologist could be treated as a servant of the hospital, and (51) that there was no ground for saying that he ceased to be the servant of the defendants. Goddard, L.J., speaking of hospital managers, said (52): "That they are not liable for the doctor's negligence is due simply "and solely to the fact that he is not their servant. I desire, "however, to say that for the purpose of this judgment I am "not considering the case of doctors on the permanent staff of "the hospital. Whether the authority would be liable for their "negligence depends, in my opinion, on whether there is a "contract of service and that must depend on the facts of any "particular case".

In the case under appeal we are not considering the position of a consulting surgeon: Dr. Fahrni was in no sense a consultant; he was employed by the corporation on the terms of the resolution of December 3, 1947. In regard to post-operational treatment and nursing, I find myself unable to draw a distinction between Dr. Fahrni on the one hand and Dr. Ronaldson or a nursing sister on the other hand. All of them are regarded as skilled persons, and often the nursing sister has more experience than the doctor. It seems to me that if the plaintiff's injury was caused by negligence on the part of anyone employed by the corporation in relation to the post-operational treatment of the plaintiff, responsibility falls in the first instance upon the corporation, the employers. I do not think it is necessary for the plaintiff to pick upon any particular employee and to prove that he was negligent in a case in which all those concerned were employees of the corporation. It is difficult indeed for the plaintiff in such a case to blame any one individual: indeed, it may well be that the trouble was caused by lack of co-ordination, or failure to have any scheme or system of examination of a surgeon's patients when the surgeon goes away for a week-end.

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(49) [1942] 2 K. B. 293, 304.

(50) Ibid. 306.

(51) Ibid. 308.

(52) Ibid. 313.

[His Lordship reviewed the evidence, and continued:] The conclusions at which I arrive are:—(1.) The prima facie case made on behalf of the plaintiff has not been displaced. (2.) It is clear that there was negligence in regard to the post-operational treatment. (3.) It is not possible for the plaintiff to say that the negligence was the negligence of any particular individual: it may be that a number of people were at fault, or that lack of system was the cause. Everything was under the control of the hospital authorities, and those immediately concerned were in the employ of the corporation. (4.) Responsibility lies upon the defendants. Even if it were shown that the whole of the trouble was due to negligence on the part of Dr. Fahrni—and that cannot be said to be the position—responsibility would still lie upon the Ministry. They are answerable whether the negligence was that of Dr. Fahrni or of Dr. Ronaldson, or of the nursing staff. (5.) No doubt the damage was increased by the leaving on of bandage and splint after the Monday, but it is unnecessary to go into this question if, as I think, responsibility for the whole of the damage lies upon the Ministry.

I am in favour of allowing the appeal of the plaintiff, and I would order that judgment be entered for him, with damages to be assessed.

DENNING, L.J. If a man goes to a doctor because he is ill, no one doubts that the doctor must exercise reasonable care and skill in his treatment of him: and that is so whether the doctor is paid for his services or not. But if the doctor is unable to treat the man himself and sends him to hospital, are not the hospital authorities then under a duty of care in their treatment of him? I think they are. Clearly, if he is a paying patient, paying them directly for their treatment of him, they must take reasonable care of him; and why should it make any difference if he does not pay them directly, but only indirectly through the rates which he pays to the local authority or through insurance contributions which he makes in order to get the treatment? I see no difference at all. Even if he is so poor that he can pay nothing, and the hospital treats him out of charity, still the hospital authorities are under a duty to take reasonable care of him just as the doctor is who treats him without asking a fee. In my opinion authorities who run a hospital, be they local authorities, government boards, or any other corporation, are in law under the selfsame duty as the humblest doctor; whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves: they have no ears to listen through the stethoscope, and no hands to hold the surgeon's knife. They must do it by the staff which they employ; and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him. What possible difference in law, I ask, can there be between hospital authorities who accept a patient for treatment, and railway or shipping authorities who accept a passenger for carriage? None whatever. Once they undertake the task, they come under a duty to use care in the doing of it, and that is so whether they do it for reward or not.

It is no answer for them to say that their staff are professional men and women who do not tolerate any interference by their lay masters in the way they do their work. The doctor who treats a patient in the Walton Hospital can say equally with the ship's captain who sails his ship from Liverpool, and with the crane driver who works his crane in the docks, "I take no orders from "anybody". That "sturdy answer", as Lord Simonds described it, only means in each case that he is a skilled man who knows his work and will carry it out in his own way; but it does not mean that the authorities who employ him are not liable for his negligence. See *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ld.* (53). The reason why the employers are liable in such cases is not because they can control the way in which the work is done—they often have not sufficient knowledge to do so—but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction for good conduct, the power of dismissal.

This all seems so clear on principle that one wonders why there should ever have been any doubt about it. Yet for over thirty years—from 1909 to 1942—it was the general opinion of the profession that hospital authorities were not liable for the negligence of their staff in the course of their professional duties.

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(53) [1947] A. C. 1, 20.

This opinion was based on a judgment given by Kennedy, L.J., in *Hillyer* v. *St. Bartholomew's Hospital* (54). I cannot help thinking that this error—for it was undoubtedly an error—was due to a desire to relieve the charitable hospitals from liabilities which they could not afford. They were dependent on voluntary contributions and their work would be seriously impeded if they were exposed to heavy claims of this sort. This must have been very present to the mind of Kennedy, L.J., concerned as he was with a claim against that great voluntary hospital, St. Bartholomew's. Indeed, he made a significant reference to the treatment being "gratuitous". But when this court in 1942 was brought face to face with the position of a county council hospital, which was not dependent on voluntary contributions, but supported by the ratepayers—the position of which was in law indistinguishable from that of a voluntary hospital—this court rejected the judgment of Kennedy, L.J., and held that the hospital authorities were liable for the negligence of their nurses and radiographers in the course of their professional duties: see *Gold* v. *Essex County Council* (55).

Even the judgment of Farwell, L.J., in *Hillyer's* case (56) has not passed unscathed. He took the view that, when a patient went into hospital for an operation, which was to be performed (be it noted) by a consulting surgeon whom the patient himself selected and employed, the hospital authorities were not responsible for the negligence of the nurses in the operating theatre. This view was based on the supposition that the nurses, whilst in the operating theatre, became temporarily the servants of the consulting surgeon. This was a tenable view so long as *Donovan* v. *Laing, Wharton, and Down Construction Syndicate Ld.* (57) was an authority; but since then the House of Lords in *Mersey Docks and Harbour Board* v. *Coggins and Griffith (Liverpool) Ld.* (58) have distinguished *Donovan* v. *Laing, Wharton, and Down Construction Syndicate Ld.* (57) almost out of existence: and there can be no doubt now that the nurses remain the servants of the hospital authorities, even when they are under the directions of the surgeon in the operating theatre. The reason is because the nurses are employed by the hospital authorities, paid by them, and liable to be dismissed by them; and the consulting surgeon has not that "entire and absolute

No!
No!

There are
professional
[illegible]

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(54) [1909] 2 K. B. 820, 828.
(55) [1942] 2 K. B. 293.
(56) [1909] 2 K. B. 820.
(57) [1893] 1 Q. B. 629.
(58) [1947] A. C. 1.

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" control " over them which is necessary to make them his servants, even temporarily: see *Gold* v. *Essex County Council* (59), *per* Lord Greene, M.R. (60), and *per* Goddard, L.J. (61).

The result therefore is that *Hillyer's* case (62) can now only be supported on the narrow ground on which Farwell, L.J., explained it in *Smith* v. *Martin* (63), namely, that the hospital authorities were not liable for the negligence of the consulting surgeon because he was not employed by them, and that no case of negligence had been proved against the nurses and carriers.

Relieved thus of *Hillyer's* case (62), this court is free to consider the question on principle: and this leads inexorably to the result that, when hospital authorities undertake to treat a patient, and themselves select and appoint and employ the professional men and women who are to give the treatment, then they are responsible for the negligence of those persons in failing to give proper treatment, no matter whether they are doctors, surgeons, nurses, or anyone else. Once hospital authorities are held responsible for the nurses and radiographers, as they have been in *Gold's* case (64) I can see no possible reason why they should not also be responsible for the house surgeons and resident medical officers on their permanent staff.

It has been said, however, by no less an authority than Goddard, L.J., in *Gold's* case (65), that the liability for doctors on the permanent staff depends " on whether there is a contract " of service and that must depend on the facts of any particular " case ". I venture to take a different view. I think it depends on this: Who employs the doctor or surgeon—is it the patient or the hospital authorities? If the patient himself selects and employs the doctor or surgeon, as in *Hillyer's* case (66), the hospital authorities are of course not liable for his negligence, because he is not employed by them. But where the doctor or surgeon, be he a consultant or not, is employed and paid, not by the patient but by the hospital authorities, I am of opinion that the hospital authorities are liable for his negligence in treating the patient. It does not depend on whether the contract under which he was employed was a contract of service or a contract for services. That is a fine distinction which is sometimes of importance; but not in cases such as the present, where the hospital authorities are themselves under a duty to use care in treating the patient.

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(59) [1942] 2 K. B. 293.
(60) Ibid. 299, 300.
(61) Ibid. 310, 311.
(62) [1909] 2 K. B. 820.
(63) [1911] 2 K. B. 775.
(64) [1942] 2 K. B. 293.
(65) [1942] 2 K. B. 293, 313.
(66) [1909] 2 K. B. 820.

I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services. Lord Blackburn laid that down on many occasions; see *Tarry* v. *Ashton* (67) *Dalton* v. *Angus* (68) and *Hughes* v. *Percival* (69); and so have other great judges, see *per* Parke, B., in *Grote* v. *Chester and Holyhead Ry. Co.* (70), and what a strong court, including Willes and Williams, JJ., said in *Pickard* v. *Smith* (71); see also *per* Lindley, L.J., in *Hardaker* v. *Idle District Council* (72) and *per* this court in *Woodward* v. *Hastings Corporation* (73).

All those cases give good illustrations of the principle, but I would add two others: one is the case of a shipowner who is under a duty to navigate his ship with reasonable care. He cannot escape that duty by delegating the handling of the ship to someone else, no matter whether it be a ship's captain under a contract of service or to a pilot under a contract for services; and that is so even though the pilot is in control and the captain acts throughout under his directions; *per* Lord Stowell in *Neptune the Second* (74). Another instance is the case of an employer who is under a duty to use care to provide a proper system of work. Even in the days before the doctrine of common employment was abolished, he could not get rid of his responsibility to his men by delegating it to a foreman or fellow-servant; see *Wilsons & Clyde Coal Co.* v. *English* (75); or even to a competent expert, *per* Lord Wright (76).

It is unfortunate that the principle which I have enunciated was not drawn to the attention of the court in *Gold's* case (77), but that was my fault, because I was counsel in the case. It was plain there that, if the radiographer was employed under a contract of service, the hospital authorities were liable for his negligence; and I contented myself with showing that he was, citing even workmen's compensation cases for the purpose. This was a bad example, for I see that workmen's compensation cases figured prominently in the later case of *Collins* v. *Hertfordshire County Council* (78). Hence the courts have drifted almost unconsciously into the error of making the liability of hospital authorities depend on whether the negligent person was employed under a contract of service or a contract for services. The judgment of Lord Greene, M.R., in *Gold's* case (79), however, gives no countenance to this error. He made the liability depend on what was the obligation which rested on the hospital authorities. He showed that hospital authorities were under an obligation to use reasonable care in treatment; see especially what he said at p. 304 of his judgment (80): whence it follows, on the authorities I have just cited, that they cannot get rid of that obligation by delegating it to someone else, not even to a doctor or surgeon under contract for services. If these authorities had been put before Hilbery, J., in *Collins'* case (81) I think he would in all probability have found the hospital authorities liable, not only for the negligence of the resident medical officer Miss Knight, but also for that of the part-time paid surgeon Mr. Hunt. Hilbery, J., clearly thought that the hospital authorities ought to be liable for the surgeon, but only decided otherwise because of the test of contract of service, which he felt bound to apply. Once that is out of the way, their liability is clear.

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(67) (1876) 1 Q. B. D. 314, 319.
(68) (1881) 6 App. Cas. 740, 829.
(69) (1883) 8 App. Cas. 443, 446.
(70) (1848) 2 Ex. 251, 254.
(71) (1861) 10 C. B. (N.S.) 470, 480.
(72) [1896] 1 Q. B. 335, 340.
(73) [1945] K. B. 174, 182.
(74) (1814) 1 Dod. 467.
(75) [1938] A. C. 57.
(76) Ibid. 81.
(77) [1942] 2 K. B. 293.

The truth is that, in cases of negligence, the distinction between a contract of service and a contract for services only becomes of importance when it is sought to make the employer liable, not for a breach of his own duty of care, but for some collateral act of negligence of those whom he employs. He cannot escape the consequences of a breach of his own duty, but he can escape responsibility for collateral or casual acts of negligence if he can show that the negligent person was employed, not under a contract of service but only under a contract for services. Take first an instance when an employer is under no duty himself: he is riding passively in a car along a road; he is not under any duty of care himself to road-users, but the driver is. If the driver is a chauffeur employed under a contract of service, the employer is liable for his negligence: but if the driver is a taximan employed under a contract for services, the employer is not liable.

Take now an instance where an employer is under a duty himself:—Suppose an employer has a lamp which overhangs his shop door; he is himself under a duty to his customers to use reasonable care to see that it is safe, and he cannot escape that duty by employing an independent contractor to do it. He is liable, therefore, if the independent contractor fails to discover a patent defect which any careful man should have discovered, and in consequence the lamp falls on a customer; but he is not liable if the independent contractor drops a hammer on the head of the customer, because that is not negligence in the employer's department of duty. It is collateral or casual negligence by one employed under a contract for services. The employer would, however, have been liable if he had got his servant to mend the lamp and his servant dropped the hammer; because that would be negligence by one employed under a contract of service. These distinctions are, however, of no importance in the present case, because we are not concerned with any collateral or casual acts of negligence by the staff, but negligence in the treatment itself which it was the employer's duty to provide.

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(78) [1947] K. B. 598.
(79) [1942] 2 K. B. 293.
(80) Ibid. 304.
(81) [1947] K. B. 598.

Turning now to the facts in this case, this is the position: the hospital authorities accepted the plaintiff as a patient for treatment, and it was their duty to treat him with reasonable care. They selected, employed, and paid all the surgeons and nurses who looked after him. He had no say in their selection at all. If those surgeons and nurses did not treat him with proper care and skill, then the hospital authorities must answer for it, for it means that they themselves did not perform their duty to him. I decline to enter into the question whether any of the surgeons were employed only under a contract for services, as distinct from a contract of service. The evidence is meagre enough in all conscience on that point. But the liability of the hospital authorities should not, and does not, depend on nice considerations of that sort. The plaintiff knew nothing of the terms on which they employed their staff: all he knew was that he was treated in the hospital by people whom the hospital authorities appointed; and the hospital authorities must be answerable for the way in which he was treated.

This conclusion has an important bearing on the question of evidence. If the plaintiff had to prove that some particular doctor or nurse was negligent, he would not be able to do it. But he was not put to that impossible task: he says, "I went into the "hospital to be cured of two stiff fingers. I have come out with "four stiff fingers, and my hand is useless. That should not have "happened if due care had been used. Explain it, if you can".

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I am quite clearly of opinion that that raises a prima facie case against the hospital authorities: see *per* Goddard, L.J., in *Mahon* v. *Osborne* (82). They have nowhere explained how it could happen without negligence. They have busied themselves in saying that this or that member of their staff was not negligent. But they have called not a single person to say that the injuries were consistent with due care on the part of all the members of their staff. They called some of the people who actually treated the man, namely Dr. Fahrni, Dr. Ronaldson, and Sister Hall, each of whom protested that he was careful in his part; but they did not call any expert at all, to say that this might happen despite all care. They have not therefore displaced the prima facie case against them and are liable to damages to the plaintiff.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *John A. Behn, Twyford and Reece, Liverpool; Solicitor, Ministry of Health; Linklaters and Paines.*

(82) [1939] 2 K. B. 14, 50.

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March 16.

Cohen,
Asquith and
Birkett, L.JJ.

EBBW VALE URBAN DISTRICT COUNCIL *v.* SOUTH WALES TRAFFIC AREA LICENSING AUTHORITY.

*Road Traffic—Omnibus company—*100 *per cent. subsidiary of British Transport Commission—Company's application to vary fares made to licensing authority—Jurisdiction of authority—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 72—*Transport Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *ss.* 2, *sub-ss.* 1, 2 (*f*) (*g*) (*i*), 3, 63–5, 76.

By s. 65, sub-s. 1, of the Transport Act, 1947, ss. 72 to 76 of the Road Traffic Act, 1930, do not apply to any passenger road transport service provided by the British Transport Commission or by any person acting as agent for the commission.

The commission, acting under the Transport Act, 1947, acquired all the shares of a passenger road transport company with power to appoint and dismiss all their directors, the company thus becoming a 100 per cent. subsidiary of the commission. There was no evidence that the commission had in fact appointed the company to act as their agent. The company applied to a licensing authority for public service vehicles under s. 72, sub-ss. 1 and 4, of the Road Traffic Act, 1930, to vary the conditions of road service licences then held by them, i.e., to increase the existing scale of fares.

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EBBW VALE URBAN DISTRICT COUNCIL *v.* SOUTH WALES TRAFFIC AREA LICENSING AUTHORITY.

Held, that the licensing authority had jurisdiction to hear the application of the company, since the service in question was not a passenger road transport service provided by the commission or by any person acting as agent for the commission. The commission, in acquiring the shares of the company in the exercise of their general duty as stated in s. 3 of the British Transport Act, 1947, were not "providing", but "securing or promoting" the provision of, an efficient, adequate, economical and properly integrated system of public inland transport.

Salomon v. *Salomon & Co. Ld.* [1897] A. C. 22 followed.

Observations of Tomlin, J., in *British Thomson-Houston Co. Ld.* v. *Sterling Accessories Ld.* [1924] 2 Ch. 33, 38, 40, referred to.

Decision of the Divisional Court reversed.

Appeal from the Divisional Court.

The applicants, Ebbw Vale Urban District Council, sought an order to prohibit the licensing authority for public service vehicles for the South Wales Traffic Area from hearing and determining an application by Red and White Services Ld. under s. 72 of the Road Traffic Act, 1930 (1), to vary the conditions of road service licences then held by them, that was, to increase their existing scale of fares. The ground for the application was that the licensing authority had no jurisdiction to hear the application by the omnibus company by reason of s. 65 of the Transport Act, 1947 (1).

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(1) Road Traffic Act, 1930, s. 72, sub-s. 1: "Subject to the provisions "of this section the commissioners "may grant to any person applying "therefor a licence (in this Act "referred to as a 'road service "'licence') to provide such a road "service as may be specified therein, "and a vehicle shall not be used as a "stage carriage or an express carriage "except under such a licence". Under sub-s. 6 power is given to the commissioners, subject to the provisions of the section, to fix such fares and make it a condition of the licence that fares shall not be charged under or in excess of the minimum or maximum. Under sub-s. 4 the commissioners may from time to time vary, in such manner as they think fit, the conditions attached to a road service licence.

Transport Act, 1947, s. 65, sub-s. 1: "Sections 72 to 76 of the Road "Traffic Act, 1930 (which relate to "road service licences) shall not "apply to any passenger road trans- "port service provided, whether "under a scheme under the preceding "provisions of this Part of this Act "or otherwise, by the Commission or "by any person acting as agent for "the Commission, but neither the "Commission nor any such person as "aforesaid shall use any public service "vehicle for the conveyance of passengers for hire or reward at "separate fares except—(*a*) on a route "approved, as respects so much thereof as falls within any traffic area, by "the licensing authority for public "service vehicles for that area; and "(*b*) in accordance with such restric- "tions as may be imposed by that "authority as to the class or descrip- "tion of vehicles which may be used "on the route and as to the portions "of the route on which, and the points "at which, passengers may be taken "up or set down . . .".

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EBBW VALE URBAN DISTRICT COUNCIL v. SOUTH WALES TRAFFIC AREA LICENSING AUTHORITY.

The Divisional Court (Lord Goddard, C.J., Hilbery and Hallett, JJ.) held that s. 72 of the Act of 1930 on the facts of the case had ceased to apply, because the services afforded by the omnibus company were provided "by the commission" or by a "person acting as agent for the commission" within the meaning of sub-s. 1 of s. 65 of the Transport Act, 1947.

The omnibus company had been a private enterprise concern when, under the Transport Act, 1947, the British Transport Commission had acquired all their shares and the power to appoint and dismiss all their directors. The omnibus company, therefore, became a 100 per cent. subsidiary of the British Transport Commission. Lord Goddard, C.J., said that the commission were providing the road passenger service of the omnibus company, though he was rather inclined to think that the omnibus company in the circumstances were acting as agents for the commission. The British Transport Commission and the omnibus company appealed.

Before the Court of Appeal, counsel for the urban district council did not see fit to support the order of prohibition made by the Divisional Court on the ground that the omnibus company provided the services as agents of the British Transport Commission: he contended that the services were provided by the commission.

Heald, K.C., and *R. J. Parker* for the commission.

Fox-Andrews, K.C., and *King-Hamilton* for the omnibus company.

Cyril Morgan for the urban district council.

The argument, based on the relevant sections of the Transport Act, 1947, appears fully from the judgment of Cohen, L.J. Counsel for the appellants cited *Salomon* v. *Salomon & Co. Ld.* (2); the speech of Lord Buckmaster in *Rainham Chemical Works Ld. (In Liquidation)* v. *Belvedere Fish Guano Co. Ld.* (3); the judgment of Tomlin, J., in *British Thomson-Houston Co. Ld.* v. *Sterling Accessories Ld.* (4); *Railway Executive* v. *Henson* (5); and *Smith* v. *London Transport Executive* (6).

COHEN, L.J. This appeal raises a question as to the jurisdiction of the licensing authority under s. 72 of the Road Traffic Act,

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(2) [1897] A. C. 22.

(3) [1921] 2 A. C. 465, 475.

(4) [1924] 2 Ch. 33, 38 and 40.

(5) (1949) 65 T. L. R. 336; 113 J. P. 333.

(6) [1949] Ch. 685; [1951] W. N. 157.

1930, to hear an application by Red and White Services Ld. for the modification of the conditions of their licence in such a way as to enable them to increase the fares which they are entitled to charge for the services that they supply in a district in South Wales.

Section 72, sub-s. 1, provides: " Subject to the provisions of " this section the commissioners may grant to any person applying " therefor a licence (in this Act referred to as a 'road service " 'licence') to provide such a road service as may be specified " therein, and a vehicle shall not be used as a stage carriage or " an express carriage except under such a licence ". Under sub-s. 6 power is given to the commissioners, subject to the provisions of the section, to fix such fares and make it a condition of the licence that fares shall not be charged under or in excess of the minimum or maximum. Under sub-s. 4 the commissioners may from time to time vary, in such manner as they think fit, the conditions attached to a road service licence. It is under that last provision that Red and White Services Ld. made the application which gives rise to the present proceedings. ✓

When the application came before the authority, the suggestion was made, and it has since been decided by the Divisional Court, that the jurisdiction of the authority had been taken away, so far as the point then under discussion was concerned, by s. 65 of the Transport Act, 1947. [His Lordship read sub-s. 1 of s. 65]. The Divisional Court decided that s. 72 of the Road Traffic Act, 1930, had ceased to apply on the facts of this case, because the services in question were services provided " by the " commission ", or by a " person acting as agent for the com- " mission ", within the meaning of s. 65.

I will refer to two passages in the judgment of Lord Goddard, C.J., in order to explain the ratio decidendi of the court. He said: " It seems to me, when one gives s. 65 the ordinary " meaning of the English language, that the transport commis- " sion, having acquired the whole of the undertaking and share- " holding of this company, and running the omnibuses of that " company for the purpose of providing a passenger service " through the Ebbw Vale, are providing a road transport service. " The vehicles are not their own: they still belong to the legal " entity which is the company; but it seems to me that the " commission are in effect providing the road passenger trans- " port, though I am rather inclined to think that the omnibus " company in the circumstances are acting as agents for the " commission ". Then, in the last paragraph he said: " Mr.

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"Heald has relied on the well-known case of *Salomon* v. *Salomon* "*& Co. Ld.* (7), which decided that in what is commonly called "a one-man company, the company is a different entity from "the man who holds the whole of the shares. And I have no "doubt here that the omnibus company are a different entity "from the commission; but it seems to me that the commission "are providing this road passenger transport service, because the "company are put there by the Transport Commission to do what "otherwise it is the privilege of the commission to do. For these "reasons I think that the order of prohibition must go".

Colloquially speaking, it may be true to say that the British Transport Commission are running the omnibuses of the company; but I am unable to agree, with all respect to the Divisional Court, that so broad a construction can properly be placed on the material phrase in s. 65: "any passenger road transport service "provided . . . by the commission or by any person acting as "agent for the commission".

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Under the ordinary rules of law, a parent company and a subsidiary company, even a 100 per cent. subsidiary company, are distinct legal entities, and in the absence of an agency contract between the two companies one cannot be said to be the agent of the other. That seems to me to be clearly established by *Salomon* v. *Salomon & Co. Ld.* (7), and by the observations of Tomlin, J., in *British Thomson-Houston Co. Ld.* v. *Sterling Accessories Ld.* (8).

Tomlin, J., said (9): "I do not think that any such "inference"—that is, an inference of agency between the directors and the company—"can be or ought to be drawn. It has been "made plain by the House of Lords that for the purpose of "establishing contractual liability it is not possible, even in the "case of the so-called one-man companies, to go behind the legal "corporate entity of the company and treat the creator and "controller of the company as the real contractor merely because "he is the creator and controller. If he is to be fixed with "liability as principal, the agency of the company must be "established substantively and cannot be inferred from the "holding of director's office and the control of the shares alone: "see *Salomon* v. *Salomon & Co. Ld.* (7). Any other conclusion "would have nullified the purpose for which the creation of "limited companies was authorized by the legislature".

(7) [1897] A. C. 22.
(8) [1924] 2 Ch. 33.
(9) Ibid. 38.

Tomlin, J., continued: "Nor does the matter stand otherwise "in regard to liability for tortious acts". And later (10): "There is no evidence from which it ought or can be inferred "that the defendant directors have authorized the wrongful acts. "To draw that inference from the fact that they are sole "directors and shareholders of the defendant company would be "manifestly wrong and contrary to the principles enunciated by "the House of Lords in the cases already referred to, and there "is no evidence of any other facts at all in relation to the "matter".

So I think that it can clearly be said here that there is no evidence to justify the inference which apparently Lord Goddard, C.J., was inclined to draw, that the omnibus company in the circumstances of the case are acting as agents for the British Transport Commission. In fairness to Mr. Morgan I add that he did not seek to support the order on the ground of agency. He did, however, strongly urge that, on a business view of the matter, the services which were provided in South Wales by the company were services provided by the commission.

I can find nothing in the Act to negative or exclude the ordinary rules of law so far as this question is concerned. I think that the proper approach to the question is to construe s. 65, sub-s. 1, in the light of the other relevant provisions of the Act; and, as Mr. Fox-Andrews said, the proper starting point is s. 3, which lays down the general duty of the commission and states the objects, as distinct from the powers, which the commission was incorporated to perform. By sub-s. 1: "It shall be the "general duty of the commission so to exercise their powers "under this Act as to provide, or secure or promote the provision "of, an efficient, adequate, economical and properly integrated "system of public inland transport and port facilities within "Great Britain for passengers and goods with due regard to "safety of operation".

I would emphasize the distinction that is plainly drawn there between "providing", on the one hand, and "securing or "promoting" on the other, the provision of an efficient system of transport. It seems to me that those words clearly visualize that the commission may either provide the system themselves or may secure or promote its provision by others. With that in mind I turn back to s. 2, which concerns the powers which the commission are to

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(10) [1924] 2 Ch. 33, 40.

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have to enable them to fulfil their object. Section 2, sub-s. 1, provides: "Subject to the provisions of this Act, the "commission shall have power—(*a*) to carry goods and passengers "by rail, road and inland waterway, within Great Britain". By sub-s. 2: "Subject to the provisions of this Act, the powers "conferred by sub-s. 1 of this section include power", and then follow a series of powers lettered in paragraphs from (*a*) to (*i*). I need only refer to paragraphs (*f*), (*g*) and (*i*). Paragraph (*f*): "to acquire by agreement (whether absolutely or for any period) "the whole or any part of any undertaking of any other person, "being an undertaking, or a part of an undertaking, the activities "whereof are wholly or mainly such activities as are specified "in the said sub-s. 1". Paragraph (*g*): "to enter into and "carry out agreements with any person for the carrying on by "that person, whether as agent for the commission or otherwise, "of any of the activities specified in the said sub-s. 1, or for the "provision by that person, whether as agent for the commission "or otherwise, of clearing house facilities in connexion with the "transport of goods". Paragraph (*i*): "to lend money to, or "give guarantees for the benefit of, any person carrying on or "about to carry on any of the activities specified in the said "sub-s. 1", and then, omitting immaterial words, "and to "acquire by agreement any securities of any body corporate "which is carrying on or about to carry on or which directly or "indirectly controls another body corporate which is carrying on "or about to carry on any such activities".

I pause here to observe that it is plain as regards the omnibus company that it is under this latter power to acquire the securities of a body corporate which is carrying on transport activities that the acquisition was made. I pause also to observe that both sub-s. 1 and sub-s. 2 are subject to provisoes prohibiting the commission from doing certain things which might otherwise be within the wide words of the enabling power.

Sub-s. 3 provides: "Where, whether by agreement or other-"wise, the commission acquire the whole or any part of any "undertaking of any other person, they may, subject to the "provisions of this Act, carry on any activities, whether "mentioned in sub-s. 1 of this section or not, which were there-"tofore carried on for the purposes of that undertaking or part of "an undertaking or were authorized by any statutory provision "to be carried on for the purposes thereof". There again that is followed by a proviso restricting the generality of the foregoing. Sub-s. 4 also contains certain restrictive powers.

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It is clear from that section, and I think that it also appears clear from ss. 63 and 64, which concern the preparation and approval of area road transport schemes and the contents of area road transport schemes, that the Act contemplates that the commission may either provide services itself or may secure the provision of those services by or through other bodies, and not only by or through agents of the commission. That being so, prima facie, it would seem necessary to see whether what is being done in any particular case is an act done to provide transport facilities, or is an act done to secure the provision of transport facilities. Where a service is provided through a subsidiary company of the commission, it seems to me that prima facie, having regard to the general rule of law, what the commission are doing is to secure the provision of road-transport facilities, and not to provide them.

That the commission can act by providing them themselves is made clear by the decision of this court to which our attention was called by Mr. Heald and Mr. Morgan, namely, *Smith* v. *London Transport Executive* (11).

That the commission can act through an agent is also clear under the express provisions of sub-s. (2) (*g*); but, as I have said, there is no question of agency here. It seems to me quite plain that it can also arrange with independent concerns to provide a service, in which case it will be performing its function of securing or promoting the provision of an efficient, adequate, economical and properly integrated system of public inland transport. In the present case, I think, the commission were securing the provision of an efficient, adequate, economical and properly integrated system of public inland transport within the meaning of s. 3, sub-s. 1, of the Act, through the omnibus company—not an independent concern, but a separate legal entity.

That conclusion, it seems to me, is rendered more certain by sub-s. 6 of s. 2 of the Act. That provides: "For the purposes "of sub-s. 4 and of the provisoes to sub-ss. 2 and 3 of this "section, where a body corporate is directly or indirectly con-"trolled by the commission, anything done by that body shall be "deemed to be done by the commission, and the undertaking of "the body shall be deemed to form part of the undertaking of "the commission". The importance of that provision seems to me to be that it is quite plain that Parliament when it passed this Act had in mind the general rule of law to which I have referred as laid down in *Salomon* v. *Salomon & Co. Ld.* (12), and many other cases, that a subsidiary company is not the agent of the parent company, but is an entirely separate entity. Its acts are not the acts of the parent company, and the parent company is not responsible for its acts or defaults, in the absence of special provisions in some contract between the parties. Parliament, with that in mind, has gone out of its way to prescribe that for certain limited purposes the acts of the subsidiary company shall be deemed to be the acts of the commission. It seems to me an inevitable inference from that provision that, except to that extent, the intention was that the ordinary rule of law should prevail and that the acts of the subsidiary company should be its own acts and not the acts of the commission.

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(11) [1949] Ch. 685; [1951] W. N. 157.

Mr. Morgan was compelled to admit that if there were a road accident the victim would have a remedy, if he had a remedy at all, not against the commission, but only against the omnibus company. That seems to me to lead to, or support, the conclusion that the services here were provided, not by the commission, but by the company.

There is another argument of Mr. Morgan's to which I ought to refer. He laid some stress on the words in sub-s. 1 of s. 65, "any passenger road transport service provided, whether under "a scheme under the preceding provisions of this Part of this "Act or otherwise". He relied upon those words as in some way enlarging the meaning to be given to the word "provided". I am unable to follow him in this part of his argument. It seems to me that, in the context in which they appear, the words "or otherwise" are merely in contrast to the words "under a "scheme", and mean no more than "provided, whether or not under a scheme under the preceding provisions of this Part of "this Act". It does not assist us in determining whether or not as a matter of fact any particular service is provided by the commission.

There is still one other argument to which I must refer. It was said that it would lead to a ridiculous, or at any rate to an artificial, situation if there were to be two bodies dealing with the same subject-matter. Section 76 of the Transport Act, 1947, contains the provisions under which the commission "shall from "time to time prepare, and submit to the transport tribunal for "confirmation, drafts of schemes (hereafter in this Act referred "to as 'charges schemes') for determining, as respects the

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(12) [1897] A. C. 22.

"services and facilities provided by the commission to which the "schemes respectively relate—(*a*) the charges which are to be "made by the commission". So, said Mr. Morgan, it is plain that in one case not the licensing authority under the Road Traffic Act, 1930, but the transport tribunal under the Transport Act, 1947, will have to determine the fares and charges which are to be made by the commission. Is it not, he said, most unlikely that the legislature intended that, as regards other cases, where in substance the service was provided by the commission, the reference should be to the licensing authority? It does not seem to me that that objection really has any substance, and in a sense it begs the question, because it is only where the services are provided by the commission that the obligation to set up a charging scheme arises; and it seems to me that Parliament, having, as it clearly had, in mind the prospect that the commission might discharge their obligations either by providing or by securing provision of the requisite services, should have visualized a different method of settling the charges according to whether the commission provided the services themselves or secured their provision. It seems to me quite natural that the charging scheme should only apply where the commission were providing the services themselves, leaving the matter to be dealt with under the Road Traffic Act, 1930, in cases where the part played by the commission was merely to secure the provision of the services.

For these reasons, I think that the proper inference from the facts proved before the Divisional Court was that this was a case where the services were not provided by the commission but the commission merely secured their provision. I therefore think that it is not a case for prohibition, and I would allow the appeal.

ASQUITH, L.J. I agree, and I would add only a word or two out of deference to the judgment from which we are differing. The case originally raised two distinct issues: did the commission within the meaning of sub-s. 1 of s. 65 "provide" these services? Or, short of that, did the omnibus company provide them as agents for the commission?

Mr. Morgan has not pressed the second point on the appeal, but, as the Divisional Court based its judgment partly on an affirmative answer to it, it is desirable to glance at it briefly. The only relevant fact before the court is that the commission own substantially all the shares in the company. The two bodies are admittedly separate legal personæ. Admittedly a subsidiary is not necessarily, as such, an agent for the controlling corporation.

There is, of course, nothing to prevent a controlling body from constituting a controlled body its agent if it chooses to do so, but there is no evidence of any such thing having happened here.

I turn, therefore, to the other question: did the commission provide these services themselves? The Divisional Court took a broad, common-sense view of the meaning of the word "provide", but in my view it has to be construed in the light of its context and the general structure of the Act. The other sections of the Act do draw a firm and sharp distinction between services "provided by" the commission themselves, and services of which they "secure the provision", presumably by other people. My Lord has read the first two or three lines of s. 3, sub-s. 1, of the Transport Act, 1947, in support of that proposition, and I will not repeat them, but the same distinction reappears in a salient form in ss. 63 and 64, concerning schemes. Sub-s. 1 of s. 63 provides: "(1) The commission may, at any time, prepare "and submit to the Minister a scheme". Sub-s. 1 of s. 64 provides: "A scheme under the last preceding section may provide "for all or any of the following matters, that is to say—(*a*) for "constituting or specifying the body or bodies who are to provide "passenger road transport services operating within or partly "within the area . . .". Then by sub-s. 2: "The commission "may be the body specified, or one of the bodies specified, in "a provision included in a scheme by virtue of paragraph (*a*) of "sub-s. 1 of this section"; so that it is not to be assumed that the distinction between services provided by the commission themselves and services which they cause other bodies to provide —a distinction which is so clearly present in the draftsman's mind when drafting ss. 63 and 64—has entirely escaped his mind when he passes on to draft s. 65. It would appear to me that the commission have not in fact themselves provided passenger road services up to this time; but it is quite clear that they could, if they wished to do so, purchase a fleet of omnibuses tomorrow and run them themselves under powers given by s. 2, sub-s. 1 (*a*) and sub-s. 2: see *Smith* v. *London Transport Executive* (13). If the commission in this case had bought, not shares in the omnibus company, but the physical assets of that company, and had engaged the company's staff to run the undertaking, in that case the commission would have been "providing" the services themselves. But it is, in my view, only if and to the extent that the commission do provide such services by themselves (or by an

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(13) [1949] Ch. 685; [1951] W. N. 157

"agent" within the meaning of sub-s. 1 of s. 65) that the jurisdiction as to fares of the licensing authority is displaced; and as neither of these conditions is fulfilled in the present case I agree with my Lord that the appeal ought to be allowed.

Birkett, L.J. I agree with both the judgments which have just been delivered. The point in this case was described by the Lord Chief Justice in the Divisional Court as being a short point, and a short point it assuredly is.

The Lord Chief Justice said: "I think, therefore, for the "reasons which I have endeavoured to express—it is a very short "point—that this is a road transport service provided by the "commission, or by persons acting as agents for the commission, "and that acccordingly the Road Traffic Act no longer applies". Also, in the Divisional Court the grounds upon which this order for prohibition was asked were these: "The relief sought is an "order of prohibition that the licensing authority for public service "vehicles for the South Wales Traffic Area be prohibited from "hearing and determining an application by Red and White "Services Ld. to vary the conditions attached to road service "licences now held by the Red and White Services Ld., that is "to say, to increase their present scale of fares. The grounds "upon which relief is sought are that the said licensing authority "has no jurisdiction to hear and determine the said application".

The short question, therefore, is: is it shown, on the true construction of the statutes, and on the facts which have been proved, that the British Transport Commission are providing these road services in South Wales so that ss. 72 to 76 of the Road Traffic Act, 1930, no longer apply?

Mr. Morgan invited the court to take a broad view, as he termed it, of the word "provide" in sub-s. 1 of s. 65, and, of course, that, I think, is the gist of the whole matter. Section 65, sub-s. 1, of the Transport Act, 1947, provides: "Sections 72 to 76 "of the Road Traffic Act, 1930 (which relate to road service "licences) shall not apply to any passenger road transport service "provided, whether under a scheme under the preceding provi- "sions of this Part of this Act or otherwise, by the commission "or by any person acting as agent for the commission". Quite naturally, Mr. Morgan said that you must take a broad view of that word "provide". If I may say so, with all respect, it was the acceptance of that invitation in the Divisional Court which led to error. The meaning of the word "provide" cannot be interpreted quite on those lines, but must be ascertained with some precision, having regard to the wording of the various sections of the Transport Act, 1947.

I think that Mr. Fox-Andrews was quite right in saying that the section which sheds most light on this matter is s. 3. There the general duty of the commission is set out. Sub-section 1 provides: "It shall be the general duty of the commission so to "exercise their powers under this Act as to provide, or secure or "promote the provision of, an efficient, adequate, economical and "properly integrated system of public inland transport and port "facilities within Great Britain for passengers and goods with due "regard to safety of operation; and for that purpose it shall be "the duty of the commission to take such steps as they consider "necessary for extending and improving the transport and port "facilities within Great Britain in such manner as to provide "most efficiently and conveniently for the needs of the public, "agriculture, commerce and industry". That is the general duty of the commission, and it is to be observed that one can conceive all sorts of matters as within the power of the Transport Commission under that section: they can provide services themselves; they can, in lieu of providing services themselves, secure the provision of services; or they can, instead of doing that, promote services, all to the end that their general duty under the section shall be fulfilled.

In this case it was shown that the commission in fact controlled the omnibus company, in this sense, that they owned all the shares, with the possible exception of two, and that they had the controlling power over the appointment and the dismissal of directors. In relation to that, sub-s. 6 of s. 2 is very important, because it is contemplated that the commission shall control, directly or indirectly, corporate bodies. The sub-section provides: "For the purposes of sub-s. 4 and of the provisoes to sub-ss. 2 "and 3 of this section, where a body corporate is directly or "indirectly controlled by the commission, anything done by that "body shall be deemed to be done by the commission", thus limiting this provision most carefully to the matters which are set out in the section, i.e., for the purposes of sub-s. 4 and the provisoes of sub-ss. 2 and 3 of s. 2. Therefore, in this case, although the commission do control the omnibus company, though they do own the shares, though they have the power to control the appointment and dismissal of directors, they do not own the property of the company and the vehicles which actually run upon the roads. As my Lord pointed out, there is no power to sue the commission either in contract or in tort. Therefore, popularly, or, if I may use Mr. Morgan's phrase, "in a broad sense", one may say, of course, that the commission provide the services, as one man might say to another, because they control the company, they own the shares; yet in fact what they are really doing here is, not to provide the services, but, as my Lord has already stated, to secure that those services are provided.

Asquith, L.J., discussed the matter of agency, which clearly influenced the Divisional Court, but which is no longer relied upon here; and Cohen, L.J., disposed of the argument raised on the use of the words "or otherwise" in the words of sub-s. 1 of s. 65: "any passenger road transport service provided whether under a "scheme under the preceding provisions of this Part of this Act "or otherwise".

In all these circumstances, I am clearly of opinion that this was not a case where the commission in fact provided the services, and, that being so, sub-s. 1 of s. 65, which eliminated ss. 72 to 76 of the Road Traffic Act, 1930, in the case of any passenger road transport service *provided* by the commission, has no application, and I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *M. H. B. Gilmour; M. H. B. Gilmour; Lewin, Gregory, Torr, Durnford & Co., for J. L. J. Price, Merthyr Tydfil.*

C. G. M.

GIBBINS *v.* SKINNER.

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Lord Goddard, C.J., Oliver and Sellers, JJ.

Road Traffic—Speed-limit signs on road with no street lighting—Motor car travelling at more than thirty miles an hour—Prescribed signs prima facie evidence that road to be regarded as a built-up area—No formal proof of direction by order of local authority necessary—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 10*—Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *ss.* 1, 36 *and* 49*—Emergency Laws (Transitional Provisions) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 26), *Sched. II.*

The defendant was convicted on an information preferred under s. 10 of the Road Traffic Act, 1930, which charged him with driving a motor car on a road in a built-up area at a speed exceeding thirty miles an hour. At the hearing of his appeal to quarter sessions the prosecution proved that the road in question had no system of street lighting, but had speed-limit signs which the defendant had passed; but they did not prove the making of any order by the local authority under s. 1, sub-s. 4, of the Act of 1934. Quarter sessions allowed the appeal on the ground that the mere existence of the prescribed speed-limit signs did not establish that the road was one in respect of which a direction under s. 1, sub-s. 4, was in force, and that the prosecution had failed to prove that such a direction existed by the production of the original order. On the prosecution's appeal to the Divisional Court:—

Held, that the presence at the beginning of a stretch of road of the prescribed speed-limit signs, which must, in view of s. 1, sub-s. 7, of the Act of 1934, be deemed to have been lawfully erected by the local authority, was in itself prima facie evidence that a direction had been given that the road should be deemed to be one in a built-up area; that that prima facie evidence had not been rebutted by the defendant; and that quarter sessions were wrong in holding that it was necessary for the prosecution formally to prove the making of the direction by production of the local authority's order.

Quære, whether a speed-limit sign is a sign for regulating the movement of traffic within s. 49 of the Road Traffic Act, 1934.

Case stated by Surrey Quarter Sessions.

An information was preferred by Frederick Edward Skinner against Arthur George Boyd Gibbins, charging him with having on July 5, 1950, at Bagshot, unlawfully driven a motor car on a road in a built-up area at a speed exceeding thirty miles per hour, contrary to s. 10 of the Road Traffic Act, 1930. The defendant pleaded not guilty, but was convicted on the information by a court of summary jurisdiction, fined 10*l*. and disqualified from driving for six months. On his appeal quarter sessions quashed the conviction.

At the hearing of the appeal by quarter sessions the following facts were proved or admitted:—On July 5, 1950, two police constables followed the motor car which the defendant was driving and ascertained that it was travelling at about fifty miles an hour and passing speed-limit signs. It continued to travel at about fifty-three to fifty-six miles an hour for four-tenths of a mile. The constables stopped the defendant and, after accusing him of exceeding thirty miles an hour in a built-up area, gave him the statutory warning of an intended prosecution. He replied: "I "was talking to my passenger and did not see the signs". Later he said: "I did not know there were any signs". The traffic signs were visible on that date. There were no lamp-posts on the road.

For the defendant it was contended that it was necessary for the prosecutor to prove that the defendant had driven at more than thirty miles an hour (which was admitted) and that the road was in a built-up area either because of a system of street lighting within s. 1, sub-s. 1 (*a*), of the Road Traffic Act, 1934, or because a direction had been given by an order lawfully made by the local authority under s. 1, sub-s. 1 (*b*), of that Act (1). In view of the fact that there was admittedly no system of lighting on the road it was contended that, since no such order had been formally proved by the prosecutor by the production of the original order in writing on the hearing of the appeal, his case lacked a necessary ingredient of proof. It was further contended that a copy of the order would not suffice and that the mere presence of signs could not prove that the road was restricted. It was argued that s. 36 of the Act of 1934, which created a presumption that a traffic sign had been lawfully placed, did not extend to speed-limit signs, but only applied to light-signal traffic signs.

(1) Road Traffic Act, 1934, s. 1, sub-s. 1: " Subject to the provisions of " this Act, it shall not be lawful for " any person to drive a motor vehicle " on a road in a built-up area at a " speed exceeding thirty miles per " hour. For the purposes of this Act " a length of road shall be deemed to " be a road in a built-up area—(*a*) if " a system of street lighting furnished " by means of lamps placed not more " than two hundred yards apart is " provided thereon, unless a direction " that it shall be deemed not to be a " road in a built-up area is in force " under this section; or (*b*) if a direction that it shall be deemed to be a " road in a built-up area is in force " under this section; and not otherwise ".

Sub-s. 4: " A direction . . . that a " length of road shall be deemed to " be a road in a built-up area notwithstanding that such a system of " lighting as aforesaid is not provided " thereon, may be given—(*a*) . . . by " the local authority, by means of an " order made by them after giving " public notice of their intention to " make an order under this subsection and after consultation with " the chief officer of police and with " the consent of the Minister ".

Sub-s. 7: " It shall be the duty of " the local authority—(*a*) to erect and " maintain the prescribed traffic signs " in such positions as may be requisite in order to give effect to general " or other directions given by the " Minister for the purpose of securing " that adequate guidance is given to " drivers of motor vehicles as to the " places where a length of road " begins, and ceases, to be a road in a " built-up area, or as to a direction " being in force as respects a length " of road that it shall be deemed to " be, or not to be, a road in a built-up area ".

Section 36: " For the purposes of " s. 49 of the principal Act a traffic " sign (being a sign for regulating by " means of light signals the movement of traffic) placed on or near a " road shall be deemed to be of the " prescribed size, colour, and type, or " of another character authorized by " the Minister under s. 48 of the " principal Act, and to have been lawfully so placed, unless the contrary " is proved ".

Emergency Laws (Transitional Provisions) Act, 1946, Sch. II: " Section " 36 of the Road Traffic Act, 1934 " (which provides that certain traffic " signs shall be presumed to comply " with statutory requirements unless " the contrary is proved) shall apply " to all traffic signs and accordingly " shall have effect as if the words " ' (being a sign for regulating by " ' means of light signals the movement of traffic) ' were omitted " therefrom ".

It was contended for the prosecutor that the direction given by an order could and should be presumed from the presence of the signs; that there was a presumption that all had been done rightly; and that the court could infer from the fact that the local authority had put up signs that a direction by an order had been validly made. It was further contended that the point of law taken by the defendant ought to have been stated in the notice of appeal; and that, if the formal production of the original order was necessary, the court should forthwith grant an adjournment to enable that technical proof to be given.

Quarter sessions, being of opinion that the prosecutor ought to have been ready with all essential elements of proof, refused to allow, after the case had been closed, an adjournment for the purpose of producing the order; and, accepting the argument on behalf of the defendant that the case against him had not been proved, allowed the appeal and quashed the conviction.

The prosecutor appealed.

Du Cann and *Stuart Horner* for the prosecution. Quarter sessions were wrong in holding that the prosecution had not produced sufficient proof that the road in question was part of a built-up area; and in any event they should have granted them an adjournment to allow the original order to be procured from a different room in the same building: *Duffin* v. *Markham* (2). It was a purely formal matter. There was no need for the prosecution to produce the original order, as there was a presumption that the prescribed speed-limit signs had been lawfully erected. Section 36 of the Road Traffic Act, 1934, provided that a traffic sign, being a sign for regulating by means of light-signals the movement of traffic, placed on or near a road should be deemed to be of the prescribed kind and to have been lawfully so placed unless the contrary were proved. Because of the decision in *Swift* v. *Barrett* (3) in 1940, an amending provision was enacted in 1946. The effect of Sch. II to the Emergency Laws (Transitional Provisions) Act, 1946, was to delete the words " being a " sign for regulating by means of light-signals the movement of " traffic " from s. 36 of the Act of 1934, and thus to make s. 36 applicable to all traffic signs.

T. M. Eastham for the defendant. Quarter sessions were right in their decision. Unless it is to be presumed that the speed-limit signs were lawfully placed, it was an essential part of the prosecution's case to prove strictly the making of the direction by producing the original order. But no such presumption exists in regard to a prosecution under s. 10 of the Road Traffic Act, 1930, which creates the offence here charged. Section 36 of the Road Traffic Act, 1934, states that that section takes effect " for the purposes of s. 49 of the principal Act ", but the defendant was not prosecuted under s. 49 of the Act of 1930, which only concerns the offence of failing to conform to the indications given by traffic signs: he was charged under s. 10 of the Act of 1930 with an offence of driving a motor vehicle on a road in excess of the speed limit. Speed-limit signs are not signs which are within the scope of s. 48 or s. 49 of the Act of 1930 as they are not signs " for regulating the movement of traffic "; and s. 36 of the Act of 1934 expressly states that the presumption of the lawful placing of traffic signs only exists in relation to s. 49 of the Act of 1930.

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(2) (1918) 88 L. J. (K. B.) 581.

(3) (1940) 56 T. L. R. 650.

It is submitted that quarter sessions were right in their refusal to grant the prosecution an adjournment, and that no injustice was done. The matter was one for their discretion, and this court should hesitate before interfering with that discretion unless it was exercised on the wrong principles. That was not so: the prosecution's lack of proper proof was not a mere formal matter but was the essence of the offence. The circumstances of the present case are very different from those in *Duffin* v. *Markham* (4), where there was a prosecution under a regulation made under the Defence of the Realm Acts, and the prosecution merely failed to produce the proper copy of the order. The prosecution should have obeyed the general rules of evidence.

Du Cann in reply. It is submitted that, by virtue of s. 1, sub-s. 7, of the Act of 1934, the prosecution adduced sufficient prima facie evidence of the existence of the direction by proving the existence of the speed-limit signs, as that sub-section provides that it is the duty of the local authority to erect and maintain the prescribed signs. It was not necessary for the prosecution to prove that an order had been validly made; but it lay with the defendant to prove that it had not been so made.

Lord Goddard, C.J., stated the facts and continued:—The point taken was that, as there was no proof that a direction had been given that this stretch of road was to be regarded as being in a built-up area, the prosecution had not proved their case.

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(4) (1918) 88 L. J. (K. B.) 581.

Mr. Eastham has advanced a very painstaking argument and called our attention to all the material sections of the Act, but we have come to the conclusion that quarter sessions came to a wrong decision because, in the opinion of the court, there was evidence which was not answered and which was prima facie evidence, unless answered, that this road had been prescribed as deemed to be in a built-up area.

The matter arises in this way. [His Lordship read s. 1, sub-ss. 1, 4 and 7, of the Road Traffic Act, 1934, and continued:] The Minister has in fact prescribed signs, purporting to do so by virtue of s. 48 of the Road Traffic Act, 1930, and s. 1 of the Road Traffic Act, 1934.

Mr. Du Cann invited the court to hold that quarter sessions were wrong, in view of Sch. II to the Emergency Laws (Transitional Provisions) Act, 1946, which was passed in these circumstances: under s. 48 of the Act of 1930, the Minister has power to prescribe various road signs; and s. 49 provides that: "... where any traffic sign being a sign for regulating the movement of traffic or indicating the route to be followed by traffic, has been lawfully placed on or near any road in accordance with the provisions of the last preceding section, any person driving or propelling any vehicle who—(*a*) neglects or refuses to stop the vehicle or to make it proceed in or keep to a particular line of traffic when directed so to do by the police constable in the execution of his duty; or (*b*) fails to conform to the indication given by the sign, shall be guilty of an offence".

In *Swift* v. *Barrett* (5), in 1940, the defendant was charged with failing to observe a "Halt" sign, and the court held that it was necessary for the prosecution to prove that the sign was of the prescribed size, colour and type, in accordance with s. 48, sub-s. 2, of the Road Traffic Act, 1930. One reason for that was that there was a provision in s. 36 of the Road Traffic Act, 1934, that lights should be presumed to be of the authorized type, but there was no provision with regard to other signs. Accordingly, the Act of 1946 was passed, which provided that: "Section 36 of the Road Traffic Act, 1934 (which provides that certain traffic signs"—that is to say, the light signs—"shall be presumed to comply with statutory requirements unless the contrary is proved) shall apply to all traffic signs and accordingly shall have effect as if the words '(being a sign for regulating by means of light signals the movement of traffic)' were omitted therefrom".

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(5) 56 T. L. R. 650.

With all respect to Mr. Du Cann's argument, I do not think that that Act has anything to do with this case. It is not a question whether the speed-limit sign conformed in colour, size and type, nor, in my opinion, was it one of the signs within ss. 48 and 49 of the Act of 1930. I doubt myself whether it is a sign for regulating the movement of traffic. It is a sign for giving notice that there is a length of road where the maximum speed is thirty miles. I would read s. 49 as regulating the movement of traffic or indicating the route, meaning whether it should be a right turn or left turn, or Halt, or Slow, or Keep left—one of the many signs to which one is accustomed. In any event the defendant was not summoned for failing to conform to the indication given by the sign; he was summoned for driving at a speed of over thirty miles per hour in a built-up area.

In my opinion, the case is covered by s. 1, sub-s. 7, of the Act of 1934, at any rate for the purpose of the prosecution establishing a prima facie case, which it is possible can be answered. It would be a very serious thing if the police, every time they prosecuted a person for driving at more than thirty miles an hour on one of these stretches of road which are deemed to be in a built-up area, had to produce, perhaps at a court many miles from the headquarters of the county council, someone to give formal proof of an order; and it would in many cases put a great deal of expense on the defendant who would have to pay the costs, especially in a case where nobody had the smallest doubt as to what was the truth of the matter. Section 1, sub-s. 7, states that it is to be the duty of the local authority—and we must presume that the local authority carry out their duties—" to erect " and maintain the prescribed traffic signs . . . in order to give " effect to general or other directions given by the Minister for " the purpose of securing that adequate guidance is given to " drivers of motor vehicles ", that the particular stretch of road is a restricted road. The Minister has prescribed under s. 1 of the Act the sign that is to be given. If, therefore, there is a sign prescribed by the Minister erected at the opening or beginning of a length of road, that is in my opinion prima facie evidence that all necessary steps have been taken to prescribe that that road should be regarded as in a built-up area. I think that it would be a great misfortune if we had to hold the contrary. I am quite certain that in a great number of cases it would mean, instead of a defendant's being fined 2*l*. and ordered to pay a guinea costs, he might very likely find himself involved in having to pay a great deal of costs because of the necessity of bringing somebody from county council offices many miles away to prove what nobody doubted.

That is enough to dispose of this case, because the court will send the case back to quarter sessions with the intimation that they were wrong in holding that it was necessary for the prosecution to prove the direction. The fact that it was proved and admitted that these signs were there is, in my opinion, prima facie proof that the necessary directions and steps have been taken to have that road deemed to be a built-up area.

It is unnecessary, therefore, for us to consider the second point in the case, that, at some time, the appeal committee were asked to grant an adjournment, in order that the particular order might be fetched from the adjoining room in the building. The justices, as I think unfortunately, and I should be prepared to hold so if necessary, refused to grant an adjournment for proving this purely technical matter. Nobody doubted for a moment that this was a restricted road, and in the court below no such point had been taken. This point was sprung on the prosecution at the last minute, and I think it unfortunate that the justices did not grant an adjournment if they thought it necessary to have such proof.

The justices should have found that it was a restricted road. The presence of the sign, which must be deemed to have been lawfully erected by the local authority, is in itself, when one considers the structure of s. 1 of the Act of 1934, proof that a direction has been given that that road shall be deemed to be a restricted area, although it is not proof that may not be rebutted. There was no rebuttal or attempt at rebuttal, and therefore the conviction ought to have been affirmed.

OLIVER, J. I agree with my Lord's judgment, with one qualification: I should like to reserve the question whether a 30-miles-an-hour sign is one for regulating the movement of traffic. At the moment, I am inclined to think it is, but in every other respect I agree with my Lord's judgment.

SELLERS, J. I agree. I think that the final words of s. 1, sub-s. 7, of the Act of 1934 reinforce what my Lord has said on the main point. Those words are as follows: "and if the local "authority make default in executing any works required for the "performance of the duty imposed upon them by this sub-section, "the Minister may himself execute the works and recover sum- "marily as a civil debt from the local authority the expenses

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Sellers, J.

"incurred by him in so doing". Therefore, there are two bodies responsible for putting up these necessary signs, giving guidance to drivers. In those circumstances the signs in themselves provide sufficient prima facie evidence of the length of road made subject to the control, as being deemed to be in a built-up area.

I, too, would like to reserve the other point which does not arise here, which is whether such a sign is one "for regulating "the movement of traffic". My present opinion is that, just like a Halt sign or Go Slow sign, a 30-miles-an-hour sign might be so regarded, especially having regard to the wording of s. 49 of the Act of 1930, which is: ". . . where any traffic sign being a "sign for regulating the movement of traffic or indicating the "route to be followed by traffic, . . .". The second alternative seems to refer to the sign which indicates course and direction and it seems open to argument that the first alternative refers to a sign which regulates the movement of traffic including its speed, such as a 30-miles-an-hour sign.

Appeal allowed.
Case remitted.

Solicitors: *Johnson, Law & Co.; Wontner & Sons.*

S. C.

HILL *v.* LUTON CORPORATION.

1951
Apr. 19.

Devlin, J.

Limitation—Public authorities' protection—Issue of writ within period —Indorsement defective—Service of writ with statement of claim curing defect after expiry of period—Validity of writ—Application to set aside—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21.

Applied. GROUNSELL *v.* CUTHELL AND LINDLEY [1952] 2 Q.B. 673

On January 28, 1950, the plaintiff was injured in an accident while a passenger in an omnibus belonging to the defendants, a public authority within the meaning of s. 21 of the Limitation Act, 1939. On July 17, 1950, she issued a writ claiming "damages for "negligence and breach of contract". On February 10, 1951, and therefore more than twelve months after accrual of the cause of action the writ was served with the statement of claim. The indorsement on the writ was admitted by the plaintiff to be defective for insufficient particularity. The defendants admitted that the statement of claim was so drafted as to cure the defect in the writ. The defendants contended that the action was barred by s. 21, sub-s. 1, of the Limitation Act, 1939, because at the expiration of the limitation period the writ which was then in existence was

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

defective, and that the action could not be saved by the defects being cured after that period had expired.

Held, (1.) that the writ was not rendered a nullity by its defective indorsement.

Truslove v. *Whitechurch* (1840) 8 Dowl. 837, and *Auster Ld.* v. *London Motor Coach Works Ld.* (1915) 112 L. T. 99 applied.

The proposition that the writ was so nullified was in any event inconsistent with dicta in *Marshall* v. *London Passenger Transport Board* [1936] 3 All E. R. 83, 90, and *Batting* v. *London Passenger Transport Board* [1941] 1 All E. R. 228, 229, to the effect that a defective indorsement on a writ was curable by a properly drafted statement of claim, for ex nihilo nihil fit; and was also inconsistent with the court's allowing amendment of a defective indorsement.

(2.) That the action could only be barred by the defect in the writ if the latter ought to be set aside on the ground of the irregularity; that there was, apart from any question of limitation, no power in the court to set aside a writ on the ground of a defective indorsement once the defect had been cured by delivery of a proper statement of claim; and that the interposition of the expiry of the limitation period between the issue of the defective writ and the delivery of the curing statement of claim made no difference, for the curing of the defect operated in the same way as if the plaintiff had the right to amend the writ without leave, and she accordingly was not in need of assistance from the court, whereas the defendants needed the assistance of the court in order to have the writ set aside. Moreover, since the defendants could not in any event expect to know their position until the writ was served, it could not affect them that they came to know of that position from two documents, the writ and statement of claim, instead of one.

Marshall v. *London Passenger Transport Board* (supra), and *Battersby* v. *Anglo-American Oil Co. Ld.* [1945] K. B. 23, and *Huntly (Marchioness)* v. *Gaskell* [1905] 2 Ch. 656 distinguished.

The action was accordingly not barred because it had been validly instituted within the prescribed period.

Secus, where the defect in a writ is such that the action cannot be effectively presented without some amendment, which can only be granted with the leave of the court.

APPEAL from a master to the judge in chambers, who delivered judgment in open court.

The plaintiff claimed damages from Luton Corporation in respect of injuries which she received in an accident while a passenger in one of their omnibuses. The master, on the defendants' application, set aside the writ and its service. The plaintiff now appealed from that order.

The facts and arguments are stated in the judgment.

M. D. Van Oss for the plaintiff.

J. G. K. Sheldon for the corporation.

DEVLIN, J. The question at issue concerns the operation of s. 21 of the Limitation Act, 1939, which requires actions against public authorities to be begun within twelve months after the date of the cause of action. I am told that this sort of point has several times lately been considered in chambers and that no case has found its way to the Court of Appeal. I have been requested by counsel to deliver judgment in open court so that, if this case likewise does not reach the Court of Appeal, this judgment may give some guidance to practitioners.

On January 28, 1950, the plaintiff was injured in an accident to a motor omnibus belonging to the defendant corporation, which is alleged to have been driven negligently. On July 17, 1950, she issued a writ claiming "damages for negligence and breach of "contract". In accordance with what is a very usual practice, the writ, which remains in force for twelve months, was not immediately served; negotiations were, I daresay, taking place, and the issue of the writ was precautionary. On January 28, 1951, the statutory time limit expired; and a fortnight or so later, on February 10, the writ was served together with a statement of claim. It is admitted by the plaintiff that the indorsement on the writ was defective for insufficient particularity; it is admitted by the defendants that the statement of claim was drafted in terms sufficiently precise to cure the defect in the writ. The position is therefore that the writ which was issued within the proper time was defective; and that the document curing the defect was not delivered within the time limit.

The defendants contend that the writ is bad and invalid and should be set aside. I do not think that the argument is advanced by the use of terms such as "bad" or "invalid" or by reference to authorities in which judges have used those terms in relation to defective indorsements generally but not in relation to the point which has here to be determined. Admittedly, the indorsement is defective and in that sense the writ is bad. But the first question is what effect the defect in the indorsement has on the writ as an instrument for commencing an action.

Order 2, r. 1, provides that every action in the High Court shall be commenced by a writ of summons which shall be indorsed with a statement of the nature of the claim made or of the relief or remedy required in the action. Order 70, r. 1, provides that non-compliance with any rule shall not render any proceedings void unless the court or a judge shall so direct, but the proceedings may be set aside either wholly or in part. Order 70, r. 1, does not, of course, apply to any proceeding which is a nullity from the start. One of the grounds set out in the defendants' summons for the setting aside of the writ is that the writ is a nullity, but Mr. Sheldon, in his argument for the defendants, fought shy of the word. Apart from an unreported decision of my brother Slade in chambers, to which I shall later refer, there is no authority which declares that a defective indorsement has that effect.

In *Truslove* v. *Whitechurch* (1) a defective indorsement was treated as an irregularity merely, and the court refused to set the writ aside, setting aside the service only. In *Auster Ld.* v. *London Motor Coach Works Ld.* (2) the Court of Appeal considered that in the case of a special indorsement which was defective the proper course was to strike out the indorsement and not to move to set aside the writ. Both these cases are inconsistent with the notion that such a defect renders the writ a nullity.

But Mr. Sheldon's concession, based on the dicta of Romer, L.J., in *Marshall* v. *London Passenger Transport Board* (3) and Lord Greene, M.R., in *Batting* v. *London Passenger Transport Board* (4), that the defective indorsement was curable by a properly drafted statement of claim really precludes the argument that the writ is a nullity. If it were a nullity, the delivery of a statement of claim could not make anything out of it: ex nihilo nihil fit. Nor could leave ever be given to amend a defective indorsement, for if it is a nullity there is nothing to be amended. If a writ is a nullity, it is void ab initio, and all that follows on it is likewise void; and no appearance or other act of waiver by a defendant can give it any virtue. That would be a drastic consequence of a defect in the indorsement which is unfortunately far from uncommon. I am told by the head clerk in the Summons and Order Department that when he inspected recently the writs issued on a day taken at random, out of twenty-eight issued twenty-three bore indorsements defective for insufficient particularity. I mention this in passing because it is regrettable that the requirements for this type of indorsement, quite clearly laid down by the Court of Appeal fifteen years ago, are still so generally ignored. Solicitors and others responsible for drafting indorsements should take warning that neglect in this respect may lead to expense and inconvenience, and perhaps to disaster to their clients, which in turn may lead to charges of professional negligence.

In the case to which I have referred, my brother Slade, as appears from a transcript of his judgment with which I have been

(1) (1840) 8 Dowl. 837.
(2) (1915) 112 L. T. 99.
(3) [1936] 3 All E. R. 83, 90.
(4) [1941] 1 All E. R. 228, 229.

furnished, did say that the writ, which bore an indorsement indistinguishable from the present, was from the outset completely void and a nullity; and he so declared it, and set aside its service. There the defect was incurable for the writ had not been served when it was in force; and the judge, following well-established authority, set aside the order for renewal. It was therefore to all intents and purposes a nullity. I am satisfied that Slade, J., used that expression with regard to it without having to measure his words to fit the point which I have to decide. I need hardly say that if I thought that Slade, J., had pronounced upon that point I should be most disinclined to differ from him. In my judgment the writ in this case, although its indorsement is bad, is effective as an instrument for commencing the action, and so remains unless and until it is set aside.

Mr. Sheldon's main argument is that the position must be judged at the expiry of the limitation period, that is, on January 28, 1951. If on that date there is a good writ, that is, one with a proper indorsement or an indorsement that has then been cured by the delivery of a proper statement of claim, the Limitation Act is satisfied; but if there is then what he calls a bad writ, the axe falls and destroys the action.

I do not think that the Act is at all concerned with good or bad indorsements: the only question to be determined under it is whether the action has been commenced within the twelve months. In this case, unless the writ was a nullity, the action was commenced within the twelve months; and that is why I think that Mr. Sheldon is logically driven to contend that the writ is a nullity, of which contention I have already disposed. Of course, although an action may be commenced by a writ with a defective indorsement, it may be that it cannot be effectively prosecuted without some amendment which can only be granted with the leave of the court. In that case quite a different set of considerations comes into play. But the principle which permits the plaintiff to cure defects in his writ by a proper statement of claim operates in the same way as if he were given the right to amend without leave. It is then immaterial that the amendment, whether it be made by delivery of a statement of claim or otherwise, is made after the expiry of the period: it is merely a step in the action which can be taken at any time which the rules permit. The writ is the only step in the action which is required to be taken before the expiry of the period.

There remains the fact that the writ was initially irregular. Ought it on that ground be set aside? I gravely doubt whether there is power to set aside a writ on the ground of a defective indorsement once that has been cured by delivery of a proper statement of claim. If there is, it is hardly possible to conceive of any ordinary case—that is, a case where no time bar is involved—where there could be any justification for its exercise. Especially when the two documents are delivered together, it would be the height of technicality to pick holes in the one in order to fill them from material in the other. Does the intervention of the Limitation Act between the two documents introduce any different considerations?

It is settled by such cases as *Marshall* v. *London Passenger Transport Board* (5) and *Battersby* v. *Anglo-American Oil Co. Ld.* (6) that the court will not after the expiry of the period permit the amendment of a writ or pleading or the renewal of a writ. There are two distinctions between that class of case and the present: in that class the plaintiff is in the first place seeking the aid of the courts, and the courts have determined that they will not grant it if to do so would be to deprive the defendant of a defence otherwise open to him. Here the plaintiff, as I have pointed out, needs no assistance from the court, for the rules allow him as of right to deliver the statement of claim with his writ and thereby to remedy without leave any defect in the latter. It is the defendant who has to come to the court to ask it in effect to deprive the plaintiff of that right by setting aside the writ. To set aside a writ for a defective indorsement is a very strong thing to do. I have not been referred to any case where it has been done, even where the defect remained uncured, except *Huntly* (*Marchioness*) v. *Gaskell* (7), where the court regarded the indorsement as tantamount to an abuse of process. In the other cases, which I have already considered, where there has been an irregular indorsement, the court has refused to set the writ aside.

The Limitation Act, 1939, s. 21, enables the defendant to know with finality at the end of the period or on the service of a writ issued within the period, whichever be the later, what cause of action he has to meet. That would be defeated and the Act emasculated if thereafter new causes of action could be freely introduced. But the defendant cannot expect to know his position before the writ is served; and it cannot make the slightest difference to him whether he learns of it then from one document or from two. For these reasons, if I have any discretion in the matter, I should not exercise it to set aside the writ. I have not to consider, and have not considered, the course which should be followed if the application to set aside were made before delivery of the statement of claim; and nothing that I have said in relation to the exercise of the power to set aside should be construed as applying one way or the other to that situation.

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(5) [1936] 3 All E. R. 83, 90.

(6) [1945] K. B. 23.

(7) [1905] 2 Ch. 656.

I therefore think that the master's order was wrong. The matter was not fully argued before him because, at that time, when both sides had not had the opportunity of examining the transcript of Slade, J.'s judgment, the point was thought to be concluded by the dictum to which I have referred.

Appeal allowed.

Solicitors: *Machin & Co.; William Charles Crocker.*

MANTON v. BRIGHTON CORPORATION.

1951
May 2.
Slade, J.

[1951 M. 1262.]

Local Government—Local authority's delegation of powers and duties to committee—Members of committee appointed for ensuing year—Power of local authority to determine membership of committee within the year—Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *ss.* 85, 96 *and Sch. III, Part V, cl.* 4.

A standing order of the defendant corporation provided that standing committees were to be appointed annually in May "for "the ensuing year to perform such duties as shall be then delegated "to them by the council" of the corporation. In May, 1950, the plaintiff, an alderman of the county borough, was appointed to serve on three standing committees by a resolution of the council of the corporation appointing the committees for "the period ending "with the next annual meeting of the council". On December 21, 1950, the council appointed an ad hoc committee to inquire into certain alleged conduct of the plaintiff, and the committee recommended that the plaintiff should no longer serve on any committee of the corporation. Their recommendation was on March 29, 1951, adopted at a meeting of the council, who thereafter treated the plaintiff as having been removed from each of the three committees on which he had been previously appointed to serve.

On a summons by the plaintiff for an interlocutory injunction to restrain the corporation from interfering with the exercise by him of his rights and privileges as a member of all committees to which he had been appointed until his term of office should expire:—

1951

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v.
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CORPORATION.

Held, (1.) that the words in the council's resolution "shall be "appointed for the ensuing year" provided a limit to the holding of the appointment: they did not mean that he should continue in all circumstances in that office in the ensuing year, but merely indicated that in normal practice he would do so; and

(2.) that the corporation, as a delegating authority, could not only at any time resume their own authority, with which they had never in fact parted, but could revoke that authority even arbitrarily or capriciously; that, if there was then power in the corporation to revoke the authority of a committee as a whole, there must be power to revoke that of a single member of it; and that the plaintiff was accordingly not entitled to an injunction.

SUMMONS for an interlocutory injunction. (By consent the hearing of the summons was treated as the trial of the action, and judgment was given in open court.)

On May 25, 1950, the plaintiff, Charles George Manton, an alderman of the county borough of Brighton, was appointed a member of three standing committees of the defendants, Brighton Corporation: the land and works committee, the staff committee and the selection committee. The resolution appointing the plaintiff provided that the three committees on which he was to serve were constituted and appointed for the period ending with the next annual meeting of the council of the corporation and were vested with all the powers and duties in the terms of the appointments then submitted. The corporation's standing order No. 27 provided that at the annual meeting of the council in May, the standing committees "shall be appointed for the ensuing "year to perform such duties as shall be then delegated to them "by the council . . .".

On December 21, 1950, the corporation appointed an ad hoc committee to inquire into alleged conduct of the plaintiff concerning the allocation of housing accommodation at the corporation's disposal. That committee reported their findings to the corporation and recommended that the plaintiff "should no longer serve on any committee of the council". The full council of the corporation considered the report on March 29, 1951, and adopted the recommendation contained in it, thereafter treating the plaintiff as having been removed from each of the committees in question.

The plaintiff claimed a declaration that he was entitled to continue to exercise all his rights and privileges as a member of all committees of the corporation to which he had been appointed until his term of office on those committees should expire; a declaration that the corporation's resolution of March 29, 1951, was ultra vires and accordingly of no legal effect; and an injunction to restrain the corporation from interfering in any way with the exercise by the plaintiff of his rights and privileges as a member of all committees of the corporation to which he had been appointed until his term of office should expire.

By the corporation's standing order No. 28: "All delegations "to standing committees . . . shall be deemed to be pursuant "to s. 85 of the Local Government Act, 1933 (1), and to all other "powers enabling the council in that behalf . . . ".

Pollock, *K.C.*, and *Stogdon* for the plaintiff.
Percy Lamb, *K.C.*, and *Widgery* for the corporation.

SLADE, J. This action was started on April 16, 1951, and came before me in chambers on a summons by the plaintiff for an interlocutory injunction. As the municipal appointments are made in May, the parties have agreed to treat the summons as the trial of the action and I was asked by counsel on both sides to deliver my judgment in the summons in open court because the matters in issue between the parties are matters of some interest to local authorities generally.

[His Lordship stated the facts, read s. 85, sub-ss. 1, 2, 3 and 4, s. 96 and para. 4 of Part V of Sch. III to the Local Government Act, 1933, and continued:] Brighton Corporation have made standing orders, Nos. 22 to 28 of which regulate the appointment of committees, and standing order 26 provides in substance that all nominations of candidates for the committees for the ensuing year—that is to say for appointment in the month of May in each year—including the members of the several committees for the preceding year who have not retired and who are willing to serve and who are eligible for re-appointment " shall be " submitted by the town clerk to a meeting " of the selection committee, which is to consist of sixteen members of the council and to be deemed to be a standing committee. The selection committee, having considered all the persons nominated and who are willing to serve on the various committees which the council desire to appoint, make recommendations to the council " as to " the members of the council who shall constitute the several " committees ".

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(1) Local Government Act, 1933. s. 85, sub-s. 1: "A local authority "may appoint a committee for any "such general or special purpose as "in the opinion of the local authority would be better regulated and "managed by means of a committee, "and may delegate to a committee so "appointed, with or without restrictions or conditions, as they think "fit, any functions exercisable by the "local authority either with respect "to the whole or a part of the area "of the local authority, except the "power of levying, or issuing a precept for, a rate, or of borrowing "money".

Sub-s. 2: "The number of members "of a committee appointed under this "section, their term of office, and the "area, if any, within which the committee is to exercise its authority, "shall be fixed by the local authority".

Sub-s. 3 provides that a committee appointed under s. 85 (other than a finance committee) may include persons who are not members of the local authority provided that at least two-thirds of the members are members of the local authority.

Para. 4 of Part V of Sch. III to the Act enables local authorities to make standing orders for the regulation of their proceedings and authorizes them to vary or revoke any such orders.

Section 96: "A local authority "appointing a committee . . . may "make, vary and revoke standing "orders respecting the quorum, proceedings and place of meeting of "the committee . . . but subject to "any such standing orders the "quorum, proceedings and place of "meeting shall be such as the committee . . . may determine".

That was done in 1950. The plaintiff was in 1949–50 a member of the selection committee. In due course that committee made a report containing their recommendations to the council, and the full council on May 25, 1950, considered that report and passed two resolutions which are set out as items 11 and 13 in the minutes of the council of that meeting. Item 11 reads: " Resolved: That pursuant to standing order No. 27 the " following standing committees of the council be and they are " hereby constituted and appointed for the period ending with the " next annual meeting of the council, and are hereby vested with " all the powers and duties in the terms of the appointments " now submitted "; and included in those standing committees were the three to which the plaintiff was appointed. Mr. Pollock put that minute in the forefront of his case, and I emphasize the words which I think form the basis of one of his arguments, namely, that " the following standing committees of the council " be and they are hereby constituted and appointed for the period " ending with the next annual meeting of the council ", which would, of course, be for the period ending in the month of May, 1951.

Item 13 records the resolution approving and adopting the recommendations contained in the report of the selection committee as to the personnel of each of those committees; and in the case of each of those three committees the personnel recommended by the selection committee and approved and adopted by the full council included the name of the plaintiff.

Standing order 27 provides: " At the annual meeting of the " council in May, the following standing committees shall be

" appointed *for the ensuing year* to perform such duties as shall " be then delegated to them by the council, and shall consist of " the number of members or be constituted in the manner set " opposite the names of such committees . . ."; and to show the constitution of each committee there follows conveniently on the left-hand side of the page the name of the committee, and opposite on the right-hand side the constitution of each committee. Some committees consist entirely of members of the council, and some consist as to at least two-thirds of members of the council, and not exceeding one-third of persons who are not members of the council. Included in standing order 27 are the land and works committee and the staff committee.

Standing order No. 28 provides: " All delegations to standing " committees other than those prescribed by statute and except " where otherwise stated, shall be deemed to be pursuant to s. 85 " of the Local Government Act, 1933, and to all other powers " enabling the council in that behalf, and such delegations shall " in all things be subject to the standing orders and regulations " of the council relating to contracts and to the conduct of " financial business ".

Mr. Lamb relies on standing order No. 14 which is headed in the manual " Rescission of preceding resolution ", and provides: " No motion or amendment shall be moved which has the " effect of rescinding or reversing a decision of the council made " within the preceding three months unless it is pursuant to the " recommendation of a committee which appears on the agenda " or unless notice thereof is given which notice shall comply with " the requirements of standing order No. 5 as to notices of " motion and shall bear the signatures of at least fifteen members " of the council ".

I construe that standing order to mean that if any motion or amendment shall be moved which has the effect of rescinding or reversing a decision of the council made within the preceding three months, the motion or amendment shall be fettered with one of the two requirements set out in the standing order—that is to say, it must either be made on the recommendation of a committee appearing on the agenda or by notice of motion complying with a certain form and bearing the signatures of at least fifteen members of the council; but that no such fetters are required in the case of a motion or amendment notwithstanding that it has the effect of rescinding or reversing a previous decision of the council, provided that the previous decision of the council which it is sought to rescind or reverse be made more than three months before the motion or amendment proposed. Mr. Lamb submits that the effect of standing order 14 is to make it clear that the council can at any time rescind or reverse one of their previous decisions, and where more than three months have elapsed since the decision was made can do so without either of the formalities prescribed by standing order 14. He contends, therefore, that if a motion came before the council at any time seeking to rescind so much of the resolution which is set out in item 13 passed by the council on May 25, 1950, as included the name of the plaintiff in the land and works committee, the selection committee and the staff committee for the ensuing year, the council would clearly have express power under standing order 14 to pass such a resolution.

He also argues that the reference to " the ensuing year " in standing order 27 merely limits the time for which the appointed members are to serve, namely, until the next annual meeting of the council, and cannot be construed so as to bind the council in any circumstances to continue for the whole of that year to delegate their powers to a committee containing all or any of the members appointed the previous May. No one suggests that any resolution was passed in pursuance of standing order 14 annulling any part of the minute of May 25, 1950; and Mr. Lamb merely points to the standing order as showing that the corporation have full powers to annul or rescind any of their previous decisions, and any of their previous decisions must include decisions which in effect appoint members of committees.

The powers and duties which are conferred by the council upon the three standing committees are very conveniently set out as to the land and works committee in the Brighton Corporation manual, at p. 97, and para. 1 consists entirely of a list of statutory powers and duties. I emphasize the statutory powers and duties, because, although a local authority may have power to delegate the performance of their duties to others, the responsibility for the due discharge of the duties remains with the authority. In other words, one can normally delegate powers, and one can, no doubt, in many cases delegate duties; but the fact that when a statutory duty is imposed upon any person, firm or corporation it has to be discharged, seems to me to import, when there is power to delegate the performance of that duty, the necessity for a measure of control upon the part of the person primarily responsible for the performance of the duty over the person to whom the actual performance of that duty is delegated by the person primarily responsible. The powers and duties of the selection committee and of the staff committee are similarly set out in the manual.

The plaintiff contends that a member of any of the council's committees, once appointed pursuant to standing order 27, can cease to be a member of that committee during the year for which he is appointed only if, being a member of the council, he ceases to be a member of the council or if, not being a member of the council, he ceases to be a member of the committee by virtue of s. 94 of the Act, which concerns persons who are disqualified. In advancing that argument Mr. Pollock says that a member of the council can only cease to be a member of any committee to which he was validly appointed under standing order 27 in one of the following ways: (1.) if he becomes disqualified under s. 94, the rubric to which is: "Disqualification "for membership of committees and joint committees"; (2.) by resignation under s. 62, which concerns vacation of an office under the Act and not, of course, vacation of the position on the committee, the argument being that, if one vacates the office of a member of the council by resignation, one automatically vacates one's appointment as a member of the committee to which one has been appointed because one is a member of the council; (3.) by statutory vacation of office by failure to attend meetings under s. 63; and, finally, by a committee-man's disqualification for office as a member of the local authority under s. 59 of the Act of 1933.

Although I do not think that Mr. Pollock actually mentioned this, it is a point which occurred to me as lending some support to the argument that he was advancing: whereas s. 63 provides for automatic vacation of office by a member of a local authority who fails during a period of six consecutive months to attend any meeting of the local authority, unless the failure was due to some reason approved by the local authority, the section contains a proviso that attendance as a member at a meeting of any committee of the local authority shall be deemed for the purposes of that section to be attendance at a meeting of the local authority. That seems to lend some weight to the argument that Mr. Pollock was advancing, for if a member of a committee can be displaced from that committee arbitrarily or capriciously, he will thereafter lose the opportunity of preventing the six months from running against him by attending the meetings of that committee. I merely mention that to show that I have not overlooked the point.

The contention put forward by Mr. Lamb on behalf of the defendant corporation is this: it is true that the statutory provisions referred to by Mr. Pollock are methods of disqualifying a committee-man or causing him to vacate office as a committee-man; they are automatic statutory disqualifications or vacations; they operate independently of the volition of the council; they are methods provided by statute which have the effect of bringing about that result. But they are not the only methods, and a person who confers authority can always revoke it. Mr. Lamb argues that the appointment of committees is nothing more than a permitted delegation by the corporation of their powers and duties; that delegation is nothing more than conferring authority on one or more persons to exercise one's powers or to discharge one's duties; that it is implicit in the conferment of any such authority that one can revoke it; and that one can if one likes revoke it capriciously. No one suggests here that Brighton Corporation would act arbitrarily or capriciously; but a principal can revoke the authority of his agent. Even if the agent has a contract to serve for ten years, the principal can still revoke the authority—though the agent, as I understand the law in such a case, will be entitled to recover damages from the principal for breach of contract. But he could not succeed in an action for an injunction to restrain the principal from refusing to allow him to continue to act as the principal's agent, which though negative in form is really equivalent to seeking a mandatory order upon the principal to allow some person to continue to act on his behalf.

Mr. Lamb says that that argument derives some force from the power, express or necessarily implied, in standing order 14, that the resolution appointing the committee, delegating the powers entrusted to that committee, is a resolution conferring authority by the council upon that committee; and that, just as they can pass a resolution conferring that power, so they can revoke that resolution, and thus deprive the appointee of the powers previously entrusted to him.

There is no authority directly on the point which I have to decide, but I think that some assistance is to be derived from two cases to which Mr. Lamb referred. In *Rex* v. *Sunderland Corporation* (2) it was held that the rule of common law that a person who is qualified cannot refuse to serve a public office to which he is appointed does not apply to the appointment of a member of a borough council to serve on a particular committee of the council. The ground of the decision was that membership of a committee is not an independent public office, and that a person who has been appointed to serve on a committee may lawfully resign from it against the will of the council who appointed him.

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(2) [1911] 2 K. B. 458.

I think the most relevant passage is in the judgment of Lord Alverstone, C.J., who considered the argument that the common law imposed upon the holder or the appointee of a public office the duty to serve in that office, and distinguished the position of a committee-man in this way (3): "But those cases are all "clearly distinguishable from that of a committee-man. They "are all independent offices, which the position of a committee-"man is not. The appointment of the committees is merely "machinery for the discharge by the council of its business, "and the acts of the committee are all subject to the council's "approval. The standing orders which have been made under "Sch. II, para. 13, for the regulation of the council's business "do not deal with the subject of resignation from a committee; "they rather contemplate that, subject to the exchange of com-"mittees with another councillor, a councillor who has once been "appointed on a committee will in practice"—I emphasize the two words "in practice"—"continue a member of that com-"mittee until his three years term of office as councillor expires". I respectfully adopt those words, and in connexion with the last point I refer again to standing order 27 and hold that those words, in so far as they refer to the ensuing year, provide a limit for the tenure of the appointment; i.e., the words "shall be "appointed for the ensuing year" mean that no appointee shall hold office after the end of the ensuing year: they do not mean that he shall continue in all circumstances in that office throughout the ensuing year, but merely indicate that in normal practice that is what he will do.

The second case to which Mr. Lamb referred is *Huth* v. *Clarke* (4), where it was held that delegation to a committee was not equivalent to a resignation by the appointor of his own powers. In that case a man was convicted of the offence of failing to muzzle a dog in accordance with an order which had been issued by the executive committee of a local authority which was responsible for carrying out the provisions of the Contagious Diseases (Animals) Act, 1878. The Act provided that the local authority might appoint an executive committee which was to have all the powers of the local authority except rating powers, and that the executive committee might appoint a sub-committee and delegate to that sub-committee all or any of the powers of the executive committee with or without restrictions and might from time to time revoke or alter any such delegation. Although the facts of the case are not material, what happened in substance was that the executive committee who were responsible for carrying out the requirements of that statute in fact delegated the whole of their powers and duties in connexion with that Act to a sub-committee, and that the sub-committee made no order at all for the muzzling of dogs. Without in any way dis-establishing the sub-committee or revoking or altering any of the powers which had been entrusted to them (and that was all the powers of the executive committee) the executive committee themselves made an order requiring dogs to be muzzled; and the defendant, who had failed to muzzle his dog and was convicted of an offence for having failed to do so, moved the Divisional Court by way of case stated to have the conviction quashed upon the ground that the executive committee, having delegated all their powers to the sub-committee, had divested themselves by that act of all their own powers under the Act; that therefore the making of the order which the executive committee made was a mere nullity; and that a criminal offence could not be committed in such circumstances.

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(3) Ibid. 462.

(4) (1890) 25 Q. B. D. 391.

Although the facts are not very material there are certain passages in the judgments of the court which I find helpful. Lord Coleridge, C.J., said (5): " It is suggested, however, that, " because there was another authority which might (had it " chosen) have violated good sense by making an inconsistent " order, the executive committee had no power to make the " regulation in question. But delegation does not imply a " denudation of power and authority; the Sixth Schedule of the " Act provides that the delegation may be revoked or altered and " the powers resumed by the executive committee. The word " ' delegation ' implies "—and these words I emphasize—" that " powers are committed to another person or body which are as " a rule always subject to resumption by the power delegating, " and many examples of this might be given. Unless, therefore, " it is controlled by statute, the delegating power can at any time " resume its authority. Here the executive committee has exercised the power which the sub-committee might have exercised " —but did not—and no question of conflict of jurisdiction " arises ".

I emphasize that the executive committee in *Huth* v. *Clarke* (6) made an order that dogs should be muzzled, and that the statutory power of revoking the authority entrusted to the sub-committee had never been exercised. Therefore, as the Lord Chief Justice suggests, had the sub-committee desired to violate good sense they could apparently have made an order that dogs need not be muzzled. I ask myself, therefore, what is the implication which is necessary to prevent the possibility of such an absurd state of affairs arising, and I respectfully supplement the Lord Chief Justice's words when he says that the delegating power can at any time resume their authority by saying that in my judgment not only can they resume their own authority—with which indeed they have never parted—but they can revoke the authority which they have delegated; if they cannot do so, then they have the two powers which would exist side by side and hypothetically might be exercised in entirely irresponsible and contradictory ways.

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(5) 25 Q. B. D. 391, 394.

(6) 25 Q. B. D. 391.

Wills, J., puts the matter in this way (7): "Delegation, as "the word is generally used, does not imply a parting with "powers by the person who grants the delegation, but points "rather to the conferring of an authority to do things which "otherwise that person would have to do himself. The best "illustration of the use of the word is afforded by the maxim, "delegatus non potest delegare, as to the meaning of which it is "significant that it is dealt with in Broom's Legal Maxims under "the law of contracts: it is never used by legal writers, so far "as I am aware, as implying that the delegating person parts "with his power in such a manner as to denude himself of his "rights. If it is correct to use the word in the way in which it "is used in the maxim, as generally understood, the word 'dele"'gate' means little more than an agent. The notion, there"fore, that the use of the word 'delegate' implies that the "executive committee parted with their own authority is mis"conceived".

I look at the nature of the delegation in this case. I have already referred, for example, to the powers and duties entrusted to the land and works committee set out in the corporation's manual. One cannot divest oneself of one's statutory duties. One can get another to perform them, and if he perform them properly, well and good; if he do not, one will still have to perform them oneself, and therefore one cannot divest oneself of those duties. I was told that, whereas most of the functions of the standing committees were to make recommendations to the council, there were also in some cases entrusted to the standing committees the exercise of executive powers. In so far as they merely make recommendations, the remedy of the appointing authority is easy: they may merely refrain from adopting the recommendations when they do not like them. In so far as the delegation is of executive powers, it seems to me it must be the case that the appointor can determine the authority of the appointee. If there is power to revoke the authority of a committee as a whole, in my judgment there must be a power to revoke the authority of any single member, which in some cases will include, of course, the authority of a person who is not a member of the council. In the result, therefore, I hold that this action fails.

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(7) 25 Q. B. D. 391, 395.

There is one final point. Mr. Pollock referred to the form of the recommendation of the ad hoc committee which was adopted by the council and the terms of which I have already read, namely, that the plaintiff should no longer serve upon the committees of the council. I do not think that any particular form of words is necessary when a principal, or a person in the position of a principal, is appointing someone in the position of agent, or when a person conferring authority desires to revoke the authority, so long as it is made clear that the authority of a person whom he has authorized to act on his behalf is being determined; and in my view that is what the words of this resolution of the council connote: they convey to the plaintiff that he shall no longer serve on any committees of the council. In other words, by that resolution adopted on March 29, 1951, they had revoked any authority or all the authority which had been conferred upon the plaintiff as a member of the committee by his appointment to that committee on May 25, 1950.

Finally, in fairness to the plaintiff I want to make it clear that the conclusion at which I have arrived is quite independent of any conduct or alleged conduct of his: I merely decide that there is power in a person to determine arbitrarily or capriciously, if he so desires, an authority which he has conferred upon some other person or persons.

Judgment for the defendants.

Solicitors: *Haslewood Hare & Co., for Bosley & Co., Brighton; Sharpe, Pritchard & Co., for J. G. Drew, Brighton.*

S. C.

MEHMET DOGAN BEY *v.* G. G. ABDENI & CO. LD.

1951
Apr. 9, 10;
20.

McNair, J.

Contract—Charterparty—Freight payable in sterling to owner's agents in London—Failure of charterers to pay on stipulated date—Breach of charterparty—Devaluation of pound sterling before permission to send money to owner in Turkey obtained—Owner's claim for loss caused by devaluation—Remoteness of damage—Functions of judge and jury in determining whether damages recoverable.

Where the question before the court is one of remoteness of damage, it is the function of the judge to direct the jury on the terms "natural and direct consequences" or "reasonably fore-"seeable consequences", and on the question whether a particular head of damage is in law capable of being a consequence falling within those expressions; and to direct them whether there is any evidence that a particular consequence is one which falls within them. It is then for the jury to find as a fact whether a particular head of damage is such a consequence, and the jury's conclusion on that matter, subject to there being evidence to support it, is final.

Special case stated by an arbitrator.

By a charterparty dated July 8, 1949, Mehmet Dogan Bey, the owner of the steamship *Tanar* flying the Turkish flag, chartered the vessel to the respondents, G. G. Abdeni & Co. Ld. of Beyrouth, to carry a full and complete cargo of barley in bulk from Lattakya, Syria, to the United Kingdom for a freight of 32*s*. 6*d*. per ton. Clause 4 provided that the freight should be "paid in "London in advance, discountless on signing bills of lading in "sterling area funds to S. Catsell & Co. Ld., London, less loading "disbursements, if any. . . . Cash for ordinary disbursements at "port of loading to be advanced by charterers if required at "highest rate of exchange . . .".

The owner carried on business in Turkey, and S. Catsell & Co. Ld. were brokers and agents who had frequently acted for him. Sometimes the freights were retained by the brokers in London for payment of the owner's obligations: sometimes on owner's instructions they were remitted to him in Turkey. Shortly after July 8, 1949, the owner instructed Catsell & Co. Ld. to remit the charter freight to him in Turkey when they received it; the charterers had no knowledge of these instructions.

On September 3, 1949, the loading was completed at Lattakya, and bills of lading were signed. By the terms of the charterparty, therefore, the freight ought to have been paid in London either on September 3, or at the latest by September 6, if a reasonable time after signing bills of lading is to be allowed. On September 7 the charterers telegraphed to their London agents that they were sending the sum of 10,512*l*. representing the freight less loading-port disbursements, but owing to some unexplained delay this sum did not reach the charterers' agents' bank in London until September 13. On September 14 a cheque was given to the owner's agents, which was cleared on September 15. No immediate steps were taken by the owner's agents to apply for permission under the Exchange Control Act, 1947, to remit the money to Turkey, and devaluation of the pound sterling in relation to the United States dollar was announced on September 18. The Turkish pound was at no material time devalued.

The owner's agents applied on September 20 for permission to send 9,000*l*., part of the 10,512*l*., to Turkey, and were granted permission on October 5, when they immediately made remittance. If that remittance had been made at any time before September 18, 1949, the owner would have received 101,550 Turkish pounds, but in fact he received only 70,560 Turkish pounds as the result of the remittance on October 5. He accordingly claimed 3,953*l*. 11*s*. 2*d*., the sterling equivalent, after devaluation, of the difference between those two amounts.

The arbitrator found (a) that the possibility that the pound sterling would be devalued in terms of the United States dollar during 1949 had been the subject of frequent discussions in the British, United States and European press both before and after July 8, 1949; but that on the other hand any intention on the part of H.M. Government in the United Kingdom to devalue the pound sterling in terms of the United States dollar had been repeatedly denied by the Chancellor of the Exchequer both before and after that date; and (b) that the charterers, their servants or agents possessed no actual knowledge either on July 8, 1949, or at any material time thereafter that, if the freight were not paid on the signing of the bills of lading or within a reasonable time thereafter, the claimant would suffer the loss for which he claimed.

The material paragraph of the arbitrator's award stated: "22. In so far as the following matters are questions of fact I "further find and in so far as they are questions of law I hold "that: (1.) the [charterers] paid the freight due under the "charterparty to Catsell & Co. Ld. on behalf of the [shipowner] "at a date later than that upon which the freight became due and "payable and thereby committed a breach of the charterparty; "(2.) if the [charterers] had not committed this breach of the "charterparty, the [owner] would not have suffered the loss of

"3,953*l*. 11*s*. 2*d*. claimed by him in this arbitration; (3.) the loss "which the owner claimed was not reasonably foreseeable on "July 8, 1949, or at any material time thereafter by either the "[owner] or the [charterers] as liable to result from the freight "not being paid by the [charterers] in accordance with the "[charterers'] obligations under the charterparty; (4.) the "[charterers] would not, if they had considered the matter on "July 8, 1949, or at any material time thereafter, as reasonable "persons have concluded that the loss which the owner claimed "was liable to result from the freight not being paid by the "[charterers] in accordance with their obligations under the "charterparty; (5.) the loss . . . did not naturally and directly "flow from the freight not having been paid by the [charterers] "in accordance with their obligations under the charterparty".

The arbitrator adjudged that the owner's claim for his loss failed, subject to the decision of the court on the question of law whether on his findings of fact the owner was entitled to the sum of 3,953*l*. 11*s*. 2*d*. as damages for breach of the charterers' obligations to pay the freight in London not later than September 6, 1949.

The findings or holdings in para. 22 (1.) and (2.) were not challenged.

Mocatta, *K.C.*, and *R. P. Colinvaux* for the claimant shipowner. It is conceded that if sub-paras. (3.), (4.) and (5.) of para. 22 of the arbitrator's award are findings of fact the matter is concluded against the owner; but it is submitted that the question of remoteness is always a question of law, or of mixed law and fact, for the judge. The cardinal principle of damages is that a party is to be placed in the same position as he would have been if the contract had been performed: *Wertheim* v. *Chicoutimi Pulp Co.* (1). Questions of damages are sometimes pure questions of law. In *Hobbs* v. *London and South Western Ry. Co.* (2), *Hammond & Co.* v. *Bussey* (3) and *Chaplin* v. *Hicks* (4) it was categorically stated that a question of remoteness in contract was always a question of law. The court must consider the probabilities in remoteness of damage, and that is a question of law. *Monarch Steamship Co. Ld.* v. *Karlshamns Oljefabriker* (*A/B*) (5) does not alter the position which those three cases established and it contains no reference to them. *British Westinghouse Electric and Manufacturing Co. Ld.* v. *Underground Electric Rys. Co. of London Ld.* (6) merely decided that the quantum of damages was a question of fact: it had no bearing on the recoverability of damages.

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(1) [1911] A. C. 301.
(2) (1875) L. R. 10 Q. B. 111.
(3) (1887) 20 Q. B. D. 79.
(4) [1911] 2 K. B. 786.
(5) [1949] A. C. 196.

The test is foreseeability. Devaluation must have been a serious possibility at the material time or the Chancellor of the Exchequer would not have repeatedly denied it: see per Lord Sumner in *Bank Line Ld.* v. *Capel & Co.* (7). Devaluation is itself evidence of the previous probability of it: see per Lord Wright in *Denny, Mott & Dickson Ld.* v. *Fraser & Co. Ld.* (8).

John Megaw for the respondent charterers. Reasonable foreseeability is always a question of fact: per Lords Wright and du Parcq in *Monarch Steamship Co. Ld.* v. *Karlshamns Oljefabriker (A/B)* (9). No finding of negligence by an arbitrator can be reviewed by a judge: per Denning, L.J., in *British Launderers' Research Association* v. *Hendon Rating Authority* (10). Reasonable foreseeability being a question of fact, the finding of the arbitrator is conclusive and not open to review by any court. If, however, the question of reasonable foreseeability is open to the court, on the specific facts as found by the arbitrator, the court must reach the same decision as the arbitrator.

As to causation, that was conclusively decided in the charterers' favour by the word "directly" as opposed to "naturally" in para. 22 (5.) of the award: *Weld-Blundell* v. *Stephens* (11).

As a matter of law, a change in the rate of exchange subsequent to the date of the breach of contract is too remote unless there be a specific term of the contract concerning the rate of exchange: Scrutton, L.J., in *Di Ferdinando* v. *Simon, Smits & Co. Ld.* (12), which was approved by the majority of the House of Lords in *Owners of S.S. Celia* v. *Owners of S.S. Volturno* (13).

Di Ferdinando v. *Simon, Smits & Co. Ld.* (12) is also an authority for the proposition that, where there is a breach of contract involving a reference to a foreign currency, the rate of conversion to sterling is the rate at the date of breach. *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat* (14) is conclusively in the charterers' favour, and there is no distinction to be drawn between that case and the present one merely because

(6) [1912] A. C. 673.
(7) [1919] A. C. 435, 454.
(8) [1944] A. C. 265, 278.
(9) [1949] A. C. 196.
(10) [1949] 1 K. B. 462.
(11) [1920] A. C. 956.
(12) [1920] 3 K. B. 409.
(13) [1921] 2 A. C. 544.
(14) [1943] A. C. 507.

it was money due under a bill of exchange, for it was expressly treated as being a case of breach of contract. The rate of exchange applicable is always that at the date of breach.

Under English law no damages are recoverable for the late payment of money due except interest: *Fletcher* v. *Tayleur* (15) and *Wallis* v. *Smith* (16).

Mocatta, K.C., in reply. If it can be found that fluctuations of exchange are " on the cards " at the time of making the contract, there is no clear English authority to prevent the recovery of that loss. On the question whether recoverability of damages is a matter of law or of fact, *McMahon* v. *Field* (17) shows that Lord Esher's judgment in *Hammond & Co.* v. *Bussey* (18) was not per incuriam. In those cases the court was only concerned with reasonable foreseeability and treated it as being a question for the court and not for the jury. That reasoning was pursued much later in *Chaplin* v. *Hicks* (19).

Cur. adv. vult.

April 20. McNair, J., read the following judgment:—The question of law left for the decision of the court by para. 25 of the case was in effect whether on the arbitrator's findings of fact the owner was entitled to the sum of 3,953*l.* 11*s.* 2*d.* as damages for breach of the charterer's obligations to pay the freight in London not later than September 6, 1949, since at the hearing before me counsel for the owner properly abandoned any claim to the larger sum mentioned in that paragraph. Subject to the decision of the court on this question the arbitrator awarded and adjudged that the claim failed.

In his able argument on behalf of the owners, Mr. Mocatta conceded that, if the issues raised in para. 22, sub-paras. (3.), (4.) and (5.) were issues of fact and not of law, the owner's claim must fail. He argued, however, that in contract at least the question of remoteness of damage is always a question of law, or at least a question of mixed law and fact for the judge and not for the jury, and he relied in particular on the statement of Blackburn, J., in *Hobbs* v. *London and South Western Ry. Co.* (20) that the question of remoteness ought never to be left to a jury, the statement by Lord Esher, M.R., in *Hammond & Co.* v. *Bussey* (21) that the question of what may be reasonably

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(15) (1855) 17 C. B. 21.
(16) (1882) 21 Ch. D. 243.
(17) (1881) 7 Q. B. D. 591.
(18) 20 Q. B. D. 79, 89.
(19) [1911] 2 K. B. 786.
(20) L. R. 10 Q. B. 111, 122.
(21) 20 Q. B. D. 79, 89.

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supposed to have been in the contemplation of the parties as the result of a breach of contract is not one for the jury, and the statement by Farwell, L.J. in *Chaplin* v. *Hicks* (22) that "the question of remoteness is for the judge: the assessment of "damages is for the jury". Reference was also made to the judgment of Brett, L.J., in *McMahon* v. *Field* (23).

This is no doubt a formidable body of judicial opinion. On the other hand, there are, in my view, equally strong indications to the contrary in the speeches in the House of Lords in *Monarch Steamship Co. Ld.* v. *Karlshamns Oljefabriker (A/B)* (24). In that case Lord Porter, in distinguishing the case of *The Malcolm Baxter Jr.* (25), relies upon the statement by Stone, J., delivering the judgment of the Supreme Court, that "there is no finding, "nor is it suggested, that at the time when the contract of "affreightment was entered into, . . . the embargo could reason-"ably have been foreseen . . .". I think that Stone, J., in this passage is clearly referring to a finding of fact, or rather the absence of a finding of fact, by the trial judge. Lord Wright states (24) that remoteness of damage is in truth a question of fact and supports this by a reference to the speech of Lord Haldane, L.C., in *British Westinghouse Electric and Manufacturing Co. Ld.* v. *Underground Electric Rys. Co. of London Ld.* (26), where Lord Haldane had said that "the quantum of "damage is a question of fact, and the only guidance the law "can give is to lay down general principles which afford at times "but scanty assistance in dealing with particular cases". I do not read the language used by Lord Haldane as referring only to the numerical assessment of the damages in terms of money. I think that Lord Haldane must have had in mind the function of the jury under proper direction of selecting the heads of damages in respect of which a monetary assessment has to be made.

Finally in *Monarch Steamship Co. Ld.* v. *Karlshamns Oljefabriker (A/B)* (24), Lord du Parcq says (27): "I do not doubt "the wisdom of the judges who, in *Hadley* v. *Baxendale* (28) "and the many later cases which interpreted or explained that "classic decision, have laid down rules or principles for the "guidance of those whose duty it is, as judges or jurymen, to "assess damages. Where those rules or principles are applied,

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(22) [1911] 2 K. B. 786, 797.
(23) 7 Q. B. D. 591.
(24) [1949] A. C. 196, 223.
(25) (1928) 31 Ll. L. Rep. 200, 202.
(26) [1912] A. C. 673, 688.
(27) [1949] A. C. 232.
(28) (1854) 9 Ex. 341.

"however, it is essential to remember what my noble and learned "friend Lord Wright, and Lord Haldane in the passage cited by "him, have emphasized, that in the end what has to be decided "is a question of fact, and therefore a question proper for a jury. "Circumstances are so infinitely various that, however carefully "general rules are framed, they must be construed with some "liberality, and not too rigidly applied. It was necessary to lay "down principles lest juries should be persuaded to do injustice "by imposing an undue, or perhaps an inadequate, liability on a "defendant", and Lord du Parcq said later (29): "I may "express my own opinion by saying that if a jury, directed in the "terms in which the Lord President's opinion shows us that he "would have directed them, had awarded the respondents the "sum of 21,634*l.* as damages, there would have been no ground "for setting aside or varying the verdict".

The apparent inconsistency between the expressions of opinion in the four cases referred to above as being relied upon by Mr. Mocatta and the speeches in the *Monarch Steamship* case (29) to which I have referred can, in my judgment, be resolved if it is accepted, as I think it must be, that it is the function of the judge to direct the jury as to the meaning of the terms "natural and direct consequences" or "reasonably fore-"seeable consequences" and whether a particular head of damage is capable in law of being a consequence falling within these phrases, and to direct them whether there is any evidence that a particular consequence is a consequence falling within these phrases; it is then for the jury to find as a fact whether a particular head of damage is such a consequence and the jury's conclusion on that point (subject to there being evidence to support it) is final.

The matter was, in my opinion, so treated in *Weld-Blundell* v. *Stephens* (30), where the third question left to the jury to which they returned an affirmative answer was whether the actions for libel brought by Lowe and Comins against the plaintiff and the damages recovered by them were "the natural and probable "consequences of the proved negligence of the defendant". The jury answered the question in the affirmative and they then assessed the monetary figure of damages.

Lord Dunedin, after referring with approval to *Scott's Trustees* v. *Moss* (31), in which "the Inner House . . . had

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(29) [1949] A. C. 196, 233.
(30) [1920] A. C. 956, 975.
(31) (1889) 17 R. 32.

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"granted an issue to the jury which asked the question whether "what had happened was the natural and probable result of what "the defendant had done", stated that in the case then before the House he had come to the conclusion that there was no evidence which entitled the jury to give the affirmative answer they did to the question put to them: see also the speech of Lord Sumner (32). It is significant that neither of these masters of the common law suggested that the issue of remoteness was never one for the jury under a proper direction. The judgment of Devlin, J., in *Royal Greek Government* v. *Minister of Transport* (33) is, as I read it, to the same effect.

If this conclusion as to the effect of the authorities is correct, then in my judgment the findings of the arbitrator in para. 22, sub-paras. (3.), (4.) and (5.) are findings of fact conclusively determining the issue in this case against the owner; the form of the findings and the citation of authorities in the case negativing any misdirection in law. I may add that, if this dispute had been tried in the commercial court, as it might have been, with the assistance of a City of London special jury, I can imagine no question more proper to be put to such a jury than the question whether this particular form of loss, namely, damages resulting from the devaluation of the pound sterling, was reasonably foreseeable by commercial men on July 8, 1949, and if the jury properly directed had answered the question in the negative, as the arbitrator did here, then their verdict would not, in my judgment, be open to challenge.

Had I, however, felt able to accept Mr. Mocatta's submission that the question of recoverability of the particular form of damages claimed was a pure question of law or a mixed question of law and of fact to be determined solely by the judge as is the question of frustration or the question of the implication of terms into a contract, I should on the facts found by the arbitrator in the other paragraphs of his award have reached the same conclusion as the arbitrator. Accepting the principles stated by Asquith, L.J., in delivering the judgment of the Court of Appeal in *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.* (34), it would in my judgment be to require a wholly unreasonable standard of prevision in the Syrian charterers in this case to hold that on July 8, 1949, when they entered into the charterparty they ought reasonably to have foreseen that there was a serious possibility or real danger that if they did not pay the freight on the due date the loss claimed would result.

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(32) [1920] A. C. 956, 988.

(33) (1950) 83 Ll. L. Rep. 228, 236.

(34) [1949] 2 K. B. 528.

The incurring of the loss depended on a series of future contingencies including the contingencies that the owner would require immediate remission of the money to Turkey, that devaluation of the pound sterling should take place at or about the due date of payment and that such devaluation would not be accompanied by a corresponding devaluation of the Turkish pound. It appears from the award that even early in September there was no reason to suppose that devaluation was imminent since the arbitrator finds that Catsell did not act unreasonably in not seeking permission from the Bank of England in advance to remit the whole or part of the freight as soon as it might be received by them, although this course was open to them.

The conclusions stated above make it unnecessary for me to deal with a number of other submissions advanced by Mr. Megaw on behalf of the charterers, namely, (1.) that, even if foreseeability of consequences is the test of recoverability of damages, there must for the owner to succeed also be an affirmative finding by the arbitrator on the question of causation; (2.) that as a matter of law any change in the rate of exchange during the contractual period (and a fortiori if subsequent to the date of breach) is too remote to give rise to a claim in damages unless there is a specific term in the contract dealing with such a contingency or the risk has been brought to the attention of the party in default at the time of the contract and he has contracted to accept that risk; (3.) that, where there is a breach of contract involving in the assessment of damages a reference to foreign currency, the rate of conversion for sterling is the rate ruling at the date of the breach. In my judgment the cases of *Di Ferdinando* v. *Simon, Smits & Co. Ld.* (35) and in particular the judgment of Scrutton, L.J. (35), and *Owners of S.S. Celia* v. *Owners of S.S. Volturno* (36) go a long way towards supporting these propositions. Nor is it necessary for me to decide whether there are any exceptions and, if so, whether the present case falls within the exceptions to the general principle stated by Willes, J., in *Fletcher and Others* v. *Tayleur* (37) that, "in the "case of non-payment of money, the measure of damages is, "the interest of the money only".

For the reasons given above I answer the question of law

(35) [1920] 3 K. B. 409, 415.
(36) [1921] 2 A. C. 544.
(37) (1855) 17 C. B. 21.

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stated in the special case in the negative, with the result that the arbitrator's award stands. The respondent charterers must have the costs of this argument before me.

Judgment for the respondent charterers.

Solicitors: *Holman, Fenwick & Willan; Constant & Constant.*

S. C.

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Apr. 25.

Lord Goddard, C.J., Croom-Johnson and Streatfeild, JJ.

PERRINS *v.* PERRINS AND ANOTHER.

Town and Country Planning—Development of land after appointed day—Service of enforcement notice—No appeal against notice within twenty-eight days—Prosecution for failing to comply—Power of justices to inquire into validity of notice—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23 *and* 24.

A local planning authority served the defendants, as owners and occupiers of land with an enforcement notice under s. 23, sub-s. 1, of the Town and Country Planning Act, 1947, alleging the unpermitted development of certain land after the appointed day by use of the land as a camping site, and requiring the land to be restored to its original condition by discontinuance of its use as a camping site and the removal of the caravans. The defendants took none of the steps specified in the notice, and lodged no appeal against it. They were charged under s. 24, sub-s. 3, of the Act with using the land in contravention of the notice. The justices acquitted them of that offence on the ground that the land in question had been used as a camping site before and on the appointed day and that the prosecutor had therefore not proved that there had been any development as alleged in the notice. On the prosecutor's appeal:—

Held, that, whether the planning authority were right or wrong in the view which they took of the development of the land, the effect of s. 23, sub-s. 3, of the Act of 1947 was that an enforcement notice which was not appealed within twenty-eight days became effective, and that the justices could not then question its validity.

CASE STATED by Southport justices.

Informations were preferred against the defendants, Nellie Perrins and Gordon Perrins, alleging that, after Southport Corporation (the local planning authority under the Town and Country Planning Act, 1947) had served on the defendants, as owners and occupiers of certain land, an enforcement notice

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requiring the use of the land as a camping site to be discontinued, they unlawfully permitted the land on June 30 and July 10, 1950, to be used as a camping site in contravention of the notice and without the grant of permission in that behalf under Part III of the Act, contrary to s. 24, sub-s. 3 (1). The prosecutor was the town clerk of Southport.

At the hearing of the informations the following facts were proved: On July 28, 1949, enforcement notices under s. 23 (1) of the Act were served on the defendants as owners and occupiers of the land in question. After reciting that it appeared to the planning authority that development, namely, the use of the land as a camping site, had been carried out after July 1, 1948, without the grant of permission in that behalf under the Act, and that the planning authority considered it expedient that steps should be taken for restoring the land to its condition before that development took place, the notice required the defendants within the period specified (which expired before June 30, 1950) to restore the land to its condition before the development took place by discontinuing the use of the land as a camping site and removing all the caravans. On July 1, 1948, the land was being used as a site for camping. On June 30 and July 10, 1950, each of the defendants permitted the land to be used as a camping site without permission under Part III of the Act.

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(1) Town and Country Planning Act, 1947, s. 23, sub-s. 1: "If it "appears to the local planning autho"rity that any development of land "has been carried out after the "appointed day without the grant of "permission required in that behalf "under this Part of this Act . . . then ". . . the local planning authority "may . . . , if they consider it ex"pedient so to do having regard to "the provisions of the development "plan . . . , serve on the owner and "occupier of the land a notice under "this section".

Sub-s. 2: "Any notice served under "this section (hereinafter called an "'enforcement notice') shall specify "the development which is alleged to "have been carried out without the "grant of such permission as afore"said . . . and may require such steps "as may be specified in the notice to "be taken within such period as may "be so specified for restoring the land "to its condition before the develop"ment took place, . . . ; and in parti"cular any such notice may, for the "purpose aforesaid, require the demo"lition or alteration of any buildings "or works, the discontinuance of any "use of land, or the carrying out on "land of any building or other opera"tions".

Sub-s. 3: ". . . an enforcement "notice shall take effect at the expira"tion of such period (not being less "than twenty-eight days after the "service thereof) as may be specified "therein: Provided that—(*a*) if within "the period aforesaid an application is "made to the local planning authority ". . . for permission . . . for the "continuance of any use of the land, "to which the enforcement notice "relates, the notice shall be of no "effect pending the final determina"tion of that application, and if "such permission as aforesaid is "granted on that application, the "notice shall not take effect; (*b*) if "within the period aforesaid an "appeal is made to the court . . . the "notice shall be of no effect pending "the final determination or with"drawal of the appeal".

Section 24, sub-s. 3: "Where, by "virtue of an enforcement notice, any "use of land is required to be discon"tinued . . . then if any person, "without the grant of permission in "that behalf under this Part of this "Act, uses the land or causes or "permits the land to be used . . . in "contravention of the notice, he shall "be guilty of an offence".

For the prosecutor it was contended that, as the time for appealing against the notice had expired, it was not competent for the defendants to challenge the averments in the notice, and that the court must hold the averments to be true without further proof.

For the defendants it was contended that, since the land was being used as a camping site on July 1, 1948, and no material change had been made in its use after that date, there had been no development of it within the meaning of s. 12 of the Act.

The justices, being of opinion that nothing in s. 24, sub-s. 3, of the Act exonerated them from requiring proof of relevant matters of fact averred in the notice; that the prosecutor had failed to satisfy them that any material change had been made in the use of the land after July 1, 1948; and that there had been no development of it as alleged in the notice, dismissed the informations.

The prosecutor appealed.

A. E. Baucher for the prosecutor. The justices were not entitled to adjudicate on the validity of the enforcement notice. The importance of such a notice is that it restricts, until subsequent permission, the user of the land in question, and it is a matter which requires registration under the Land Charges Act, 1925. In *Higham* v. *Havant and Waterloo Urban District Council* (2) it was said that such a notice could be taken into consideration in the settlement of the amount of compensation to be paid on compulsory purchase. The offence with which the defendants were charged was doing something in contravention of the notice. If it were open to the justices fifteen months after the date of the notice to inquire into the rights or wrongs of the local authority in making the order and serving the notice, the effectiveness of the order would vanish. Section 23, sub-s. 3, of the Town and Country Planning Act, 1947, provides that if no appeal is lodged by the person receiving the notice within the specified time (not being less than twenty-eight days), the notice is to take effect. As the present notice was not appealed, the justices had no power to investigate the facts stated in it, for it had already taken effect by virtue of s. 23, sub-s. 3. It was held in *Swindon Corporation* v. *Pearce and Pugh* (3), with regard to a notice served under s. 5 of and Sch. I to the Town and Country Planning (Interim Development) Act, 1943, that the court had no jurisdiction to consider the reasons which had led the authority to decide that it was necessary or expedient to prohibit a certain use of land; similarly, in *Cohen* v. *West Ham Corporation* (4), with regard to notices under s. 17 of the Housing Act, 1930.

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(2) [1951] 1 K. B. 509.

R. Gordon Clover for the defendants. In considering whether this offence has been committed, regard must be had to Part III of the Act of 1947. Its effect is twofold: to provide for development in accordance with the plan, and to prevent development except in accordance with the plan. To achieve its second object s. 12 provides that permission shall be required in respect of any development carried out after the appointed day, and s. 23 states that the persons on whom an enforcement notice is served may appeal against it, whether it requires something to be done or a certain use of land to be discontinued. The court should have regard to the scheme of the Act, which is to prevent development after the appointed day. In the present case there has been no development after the appointed day, although the local authority have asserted that there has. The defendant could have appealed; but it is to be observed that, whereas s. 24, sub-s. 1, expressly provides that if, in the case of a notice requiring steps to be taken, no appeal is made and no steps are taken the authority may themselves take those steps, there is no such express provision for a notice which requires the discontinuance of certain use of land.

LORD GODDARD, C.J. When the case came before the justices the enforcement notice was proved and the defendants endeavoured to show that it was bad on the ground that they had not developed the land since July 1, 1948, and were only using it for the purpose for which they were using it before July 1, 1948. The justices decided that they were entitled to go into the validity of the notice.

I cannot agree with the justices in that or in their second holding. It seems to me that the statute is really too clear for argument on this point. By s. 23 of the Town and Country

(3) [1948] 2 K. B. 301.

(4) [1933] Ch. 814.

Planning Act, 1947, power is given to the local authority to serve a notice requiring that there shall be no development on particular land.

[His Lordship read s. 23, sub-ss. 1, 2 and 3, and continued:] Sub-s. 3 means, I suppose, that the person upon whom the notice is served may go to the local authority and ask them to withdraw or vary it, or he may appeal to petty sessions. That has to be done within twenty-eight days, and if it is not done within that time, the notice takes effect.

Whether the corporation were right or wrong in the view which they took here, it seems to me that the Act provides that if a planning authority choose to serve an enforcement notice, and that notice is not challenged within twenty-eight days, it becomes effective, and there is the end of the matter.

Section 24, sub-s. 1, provides that where an enforcement notice requires something to be done other than mere discontinuance of use, for instance, the demolition of a building which has been put up, the local planning authority may themselves go on to the land and demolish it or do whatever work is necessary, and can then sue in the civil courts for the cost of doing so. It is there expressly provided that if the person who is so sued "having been entitled to appeal to the court under the last foregoing section, failed to make such an appeal, he shall not be entitled in proceedings under this sub-section to dispute the validity of the action taken by the local planning authority upon any ground which could have been raised by such an appeal".

That seems to me to be a provision expressly included in order to limit the defences which can be raised. It leaves it open to the owner or occupier to take certain other objections, for instance, that the work done by the local authority was unnecessary, in the sense that they have done more work than necessary or done it at an unreasonable cost, or something of that sort; but it prevents the owner or occupier, or whoever is sued, from taking objection to the notice. It would be very odd that he should not be entitled to take objection to the notice when summoned for the cost of doing the work while still being entitled to take objection when he is prosecuted under s. 24, sub-s. 3, for failing to observe its terms.

The offence in question is created by s. 24, sub-s. 3. [His Lordship read the sub-section.] The offence is doing something in contravention of the notice, the notice which the previous section says shall be effective at the end of twenty-eight days unless there is an appeal. Therefore, it is not for the justices, when a person is prosecuted for the offence of contravening an enforcement notice which has not been appealed, to go into the question whether the notice was a good or a bad one: it has become effective, and, once it is effective, it is the duty of the person who has had the opportunity of appealing against it, and has not appealed, to abide by it.

In my opinion, it is clear that the justices were wrong. I can understand the view which they took, but it is clearly a wrong view. The case must go back to them with an intimation that it is their duty to convict.

CROOM-JOHNSON, J. This seems to me to be a plain case. What seems to have happened is that the justices, having had their attention directed to the express words in s. 24, sub-s. 1, have then gone back to s. 23 to see if they can find any words like them there. That is really, I think, the process which has induced them to come to their conclusion on s. 23. They ought to have construed s. 23 as a whole. When that has been done the situation seems plain. I concur in the judgment proposed.

STREATFEILD, J. I am of the same opinion. In my view, as s. 23 contains specific machinery for obtaining either the cancellation or the variation of the enforcement notice, it is not open to the person who is subsequently prosecuted for failing to carry out something required by the notice to question its validity when he has let pass the opportunity of challenging it given by s. 23. Having done that, he has no defence to a prosecution under s. 24, sub-s. 3. I agree that this appeal must succeed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co., for the Town Clerk, Southport; Pritchard, Englefield & Co., for Sydney Haworth, Southport.*

S. C.

C. A.

1951
May 3.

Somervell, L.J., Croom-Johnson and Romer, JJ.

PERRY *v.* DEMBOWSKI.

[Plaint F. No. 2018.]

Landlord and Tenant — Rent restriction — Statutory tenant living in unmarried association with man at her death—Child born of association—Whether man a member of "tenant's family"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*).

The defendant, a Polish ex-officer, had for a number of years lived in unmarried association with a woman, who at the time of her death was the statutory tenant of a dwelling-house within the Rent Restriction Acts. There was a son, aged five years, born of the association. At the death of the tenant the landlord sued for possession of the premises. The defendant claimed to be entitled to remain on as tenant under s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as a member of the statutory tenant's family. Counsel on his behalf sought to distinguish the case from *Gammans* v. *Ekins*, [1950] 2 K. B. 328, on the ground that there was a child born of the association whom the defendant proposed to try legally to adopt. The county court judge having granted the landlord an order for possession, the defendant appealed.

Held, that, though it might be possible for the court to distinguish *Gammans* v. *Ekins* (supra), and to hold that the father of an illegitimate child came within s. 12, sub-s. 1 (*g*), as a member of the mother's family if he could prove that he ought to be treated as having de facto adopted the child and maintained it during the lifetime of the mother, and had continued to maintain it after her death, and was taking steps to make the de facto position permanent, as by seeking to be allowed legally to adopt the child, the evidence in this case fell far short of that proof; and the mere fact that a child had been born of the association did not make the defendant a member of the deceased tenant's family.

APPEAL from Judge Tudor Rees, sitting at Brentford county court.

In 1943 a Mrs. Bild became the tenant of 13 Woodstock Road, Bedford Park, premises owned by the plaintiff, at a rent which brought them within the Rent Restriction Acts. Subsequently there was an increase of the rent which, as was found by the county court judge, changed the contractual tenancy into a statutory tenancy. The defendant Dembowski, a Pole, and the tenant occupied the premises as man and wife, though they were not married, and the latter went under the name of the former. In 1946 a male child was born of the association. In July, 1950, the tenant died, and the plaintiff landlord sued for possession of the premises. The defendant claimed to be entitled to remain in occupation as a member of the deceased tenant's family within the meaning of s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1). He also claimed to succeed to the statutory tenancy as the person having the care of the illegitimate child of the statutory tenant, whom he proposed ultimately to adopt.

The county court judge held that the defendant was not a member of the tenant's family and had no legal standing as regarded the child. He therefore granted the landlord an order of possession.

The defendant appealed.

H. B. Figg for the defendant. In *Gammans* v. *Ekins* (2), the Court of Appeal decided that if a man and a woman lived in illicit association and the tenant of the dwelling-house died the other party had no right to remain in occupation, under s. 12, sub-s. 1 (*g*), of the Act of 1920, as a member of the tenant's family. In that case there was no child born of the association and the court left open the question whether, if there were children, the surviving parent could claim as a member of the tenant's family. The defendant here wishes to adopt the child and it is submitted that the case is to be distinguished from *Gammans* v. *Ekins* (2). It is not desired to contend that the child of the statutory tenant, who is only five years of age, can succeed to the statutory tenancy, but it is suggested that the defendant, having placed himself in loco parentis to the child can succeed to the tenancy either as a member of the family or as guardian of the child.

Roger Willis, for the landlord, was not called on.

SOMERVELL, L.J., stated the facts, and continued:—The defendant set up a defence, which failed before the county court judge and which is not proceeded with here, namely, that he, and not the deceased tenant, was the tenant. Then he went on to say that if he was not the tenant he sought to rely on s. 12,

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1: "For the purposes of "this Act, except where the context "otherwise requires . . . (*g*) . . . "the expression tenant includes the "widow of a tenant dying intestate "who was residing with him at the "time of his death, or, where a tenant "dying intestate leaves no widow "or is a woman, such member of the "tenant's family so residing as afore-"said as may be decided in default "of agreement by the county court".

(2) [1950] 2 K. B. 328.

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1951

PERRY
v.
DEMBOWSKI.

Somervell, L.J.

sub-s. 1 (*g*), as a member of the tenant's family. He adds that he has to reside at and occupy the premises in pursuance of his duty to look after and bring up his child, whom he proposes to try legally to adopt.

It was decided in *Gammans* v. *Ekins* (3) that a man who had been living with a woman, not being married, could not be held to be a member of the tenant's family within the meaning of the sub-section. Therefore the landlord was entitled to possession. In that case there were no children of the union, and the court left open the question whether, if two unmarried persons are living together and there are children of that union, on the death of the wife who is the tenant the survivor can claim as a member of the tenant's family within s. 12, sub-s. 1 (*g*). I have said that in his pleadings the defendant alleged that he proposed to try legally to adopt the child, but, at the hearing, which took place some six months after the death of the tenant, he gave no evidence to the effect that he had made any application of that kind, and it was admitted before us by his counsel that he had, up to the moment, taken no steps to that end.

It seems to me that if one is to distinguish the position of a man who has lived with the tenant but not as her husband, on the ground that there are children, it must depend on his relationship as putative father to the child or children. At first I was inclined to think that the fact that he had taken no steps to adopt the child, or, as possibly he might, to make himself the child's guardian, made it impossible to distinguish this case from *Gammans* v. *Ekins* (3). But that is, I think, somewhat too simple an approach. As Mr. Figg submitted, I think with force, the matter has first to be considered in the light of the position as and when the tenant dies. It is clear from the facts and the cases that the law has recognized what is described as de facto adoption by a father of an illegitimate child. In those circumstances he will be held bound to maintain or provide for the child or—to quote from the headnote to *Cameron* v. *Baker* (4)—" to " continue to do so, or to provide for the child himself, or to give " the most distinct notice of his intention to pay such annual " sum no longer "

I will indicate the type of fact or circumstance in which, I think, the court might distinguish *Gammans* v. *Ekins* (5) and find that the father of an illegitimate child might be entitled to say that he came within s. 12, sub-s. 1 (*g*). I am not saying that the court would so decide. It must be left to be decided when facts of the kind indicated arise. If the defendant in this case had led evidence to show that he ought to be treated as having de facto adopted the child, that he had maintained it while the mother was alive, and that he intended to maintain it, a different question might arise. I am not saying exhaustively what evidence would be necessary; but if he did show that he had de facto adopted the child during the lifetime of the mother, and then went on to show that since she died he had maintained it throughout, and also was seeking to make the de facto position permanent by at any rate seeking to be allowed legally to adopt the child, or taking such other steps as indicated such an intention, I think that, in those circumstances, it might be fairly forcibly argued that he should be treated as a member of the family.

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(3) [1950] 2 K. B. 328.
(4) (1824) 1 Car. & P. 268.
(5) [1950] 2 K. B. 328.

But I think that the evidence in this case falls short of what is required under both heads, by which I mean (a) the position at the time of the death of the mother, and (b) the failure to take any steps since. The defendant has some evidence that he paid the rent, and that he paid for a stove; but it is evidence of a most fragmentary kind, which does not enable the court to come to any clear conclusion what was his responsibility vis-à-vis either the mother or the child. The child has been away for reasons of health, he says, since the death of the mother. He says that he is looking after it, but he does not say that he is paying for it. He says that he is " fetching it tomorrow ". I think that this falls short of what would be required to show that he had put himself in the position of having de facto adopted the child. The court has to consider the state of circumstances at the date of the death, and the steps which the father takes after the mother's death are a very important part of the picture, in my view, as indicating the position in which he then was. That is also relevant as showing how, the wife having died, he has, or has endeavoured to, place himself in a permanent relationship with the child. So far as that is concerned the evidence is wholly against any such conclusion. I am not satisfied that this point was really taken in this form before the county court judge. If it was not that might be a fatal objection to it. The judgment of the county court judge is short. Obviously the point taken was whether this man was a member of the family.

Mr. Figg, as part of his argument, suggested in the first instance that we should consider the position of the child under

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s. 12, sub-s. 1 (*g*). That, I think, is impossible. I am not saying that when there are children it may not be right and proper, if a guardian ad litem is appointed, to consider their position and their rights under s. 12, sub-s. 1 (*g*), if any, in proceedings such as this. But the child is not before the court and the defendant is in no way in a position to represent it or to bind it by any judgment.

For these reasons I think that the appeal must be dismissed.

CROOM-JOHNSON, J. I am of the same opinion. I can find no trace of this last point having been raised or determined at the trial. I think that formidable objection could have been taken on that account if there had been material before us which would have enabled us to consider what was the right decision, as a matter of law, upon all the facts and circumstances appropriate to this establishment. It may very well be that it is because of that that the evidence which would give rise to the consideration of such a point is not reflected, to say the least of it, in any of the papers which have been brought to our attention. In those circumstances, I agree with the judgment which is proposed and with the reasons which have been given by my Lord in respect of the first point.

Upon what the result would have been if all the facts had been before the court on the question whether this establishment came within the word "family" in s. 12, sub-s. 1 (*g*), of the Act of 1920, I desire to express no opinion whatsoever. As to the second point, it may, of course, give rise hereafter to some somewhat difficult problems. For the reasons which have been given by my Lord, I do not see how they can be raised in this appeal, and, in these circumstances, I propose to say no more.

ROMER, J. I agree.

Appeal dismissed.

Solicitors: *Claude Barker & Partners; Shepheards & Bingley.*

A. W. G.

REX *v.* BARNETT AND OTHERS.

C. C. A.

1951
Apr. 10.

Oliver, Cassels and Sellers, JJ.

Criminal Law—Conspiracy—Statutory offences triable summarily—Sale by auction—Consideration for abstaining from bidding—Indictment for conspiracy to commit statutory offences—Particulars of conspiracy alleged in terms of statutory offences—Validity of indictment—Auctions (Bidding Agreements) Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 12), *s.* 1.

A number of persons alleged to be dealers in scrap metal were charged on a count of an indictment which alleged that they " conspired together and with other persons unknown to contravene the " provisions of s. 1 of the Auctions (Bidding Agreements) Act, 1927, " by, being dealers, agreeing to offer and accept consideration as an " inducement or reward for abstaining from bidding at sales by " auction ".

Held, that an agreement such as that alleged did not constitute an offence before the coming into force of the Act of 1927, which provided only for the summary prosecution of a contravention of it; that the principle that, where a statute made unlawful what was lawful before and appointed a specific remedy that remedy and no other must be pursued, applied, notwithstanding that a conspiracy was alleged, for the particulars alleged of that conspiracy described substantially in terms offences which the Act of 1927 created; and that the count was therefore bad in law.

APPEALS from convictions.

The appellants, all alleged to be interested in businesses which dealt in scrap metal, were convicted on indictment at the Central Criminal Court on November 28, 1950, the relevant count of which charged that they " between September 26, 1949, and " January 5, 1950, in the County of London conspired together " and with other persons unknown to contravene the provisions " of s. 1 of the Auctions (Bidding Agreements) Act, 1927 (1), by, " being dealers, agreeing to offer and accept consideration as an " inducement or reward for abstaining from bidding at sales by " auction ".

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(1) The Auctions (Bidding Agreements) Act, 1927, s. 1, sub-s. 1: " If " any dealer agrees to give, or gives, " or offers any gift or consideration to " any other person as an inducement " or reward for abstaining, or for " having abstained, from bidding at a " sale by auction either generally or " for any particular lot, or if any " person agrees to accept, or accepts, " or attempts to obtain from any " dealer any such gift or consideration " as aforesaid, he shall be guilty of an " offence under this Act, and shall be " liable on summary conviction . . .".

Sub-s. 3: " In England and Wales " a prosecution for an offence under " this section shall not be instituted " without the consent of the Attorney-" General or the Solicitor-General ".

It was alleged on behalf of the Crown that the appellants and others agreed to form a ring, and that in pursuance of that agreement they attended at auction sales where cable and other Ministry of Supply commodities were being sold; that some representatives of the ring bid for and acquired goods on behalf of the ring; and that the goods were then re-auctioned and the profits shared by the ring in an agreed proportion.

The consent neither of the Attorney-General nor of the Solicitor-General was obtained to the institution of the prosecution.

It had been contended at the outset of the trial that this count of the indictment was bad in law.

G. D. Roberts, K.C., and *S. A. Morton*; *W. J. K. Diplock, K.C.*, and *James Burge*; *R. F. Levy, K.C.*, and *J. L. Elson Rees*; *A. P. Marshall, K.C.*, and *G. Pollock, K.C.*; *Gerald Howard, K.C.*, and *C. L. Hawser*; *Geoffrey Lawrence, K.C.*, and *J. S. Streeter*; and *Bernard Finlay*, for the appellants.

R. E. Seaton and *Maxwell Turner* for the Crown.

Roberts, K.C., and *Morton*, for the appellant Barnett, made the following preliminary submission which was adopted by counsel for the other appellants:—The material count of the indictment charged no more in substance than contraventions of s. 1, sub-s. 1, of the Auctions (Bidding Agreements) Act, 1927. Before the coming into force of that Act the acts charged did not constitute a criminal offence: *Rawlings* v. *General Trading Co.* (2). It was therefore necessary to follow the procedure prescribed by that Act in prosecuting the appellants: *Eastern Archipelago Co.* v. *Reg.* (3); *Reg.* v. *Hall* (4); *Rex* v. *Kakelo* (5). But that procedure was not followed.

The Act makes the offence one triable summarily only, and not on indictment. It therefore requires it to be tried within six months of the date of its alleged commission, and it requires the consent of a law officer to the prosecution. None of those three requirements has been satisfied. This count of the indictment was therefore bad in law.

Seaton and *Turner* for the Crown. The indictment alleged a conspiracy—an offence at common law distinct from the offences created by the Act of 1927. For such a conspiracy criminal proceedings can be taken in the same way as for any other common-law conspiracy.

(2) [1921] 1 K. B. 635.
(3) (1853) 2 El. & Bl. 856.
(4) [1891] 1 Q. B. 747.
(5) [1923] 2 K. B. 793.

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SELLERS, J. [delivering the judgment of the court, reviewed the facts, and continued :] It has been submitted that the offence of which the appellants have been convicted was not an indictable offence but in substance or in terms no more than that which was framed for the first time in s. 1 of the Auctions (Bidding Agreements) Act, 1927; that it was accordingly only triable summarily with the consent of one or other of the law officers; and that, this being a matter of summary jurisdiction, the offence was only triable in any event within six months of the date of its alleged commission. The conclusion to which this court has come is that this count of this indictment did not lie. The submissions made on behalf of the eight appellants were in our opinion good, and the count should have been quashed at the outset.

Before the recorder and before this court it was said, and rightly, that before the coming into force of the Act of 1927 such an agreement did not constitute an offence; and *Rawlings* v. *General Trading Company* (6) was relied on. We think it clear that the forming of a ring in order to bid at an auction in the way indicated was not an offence at law up to the passing of the Act of 1927. That being so, it is submitted that, on a well-known principle, the procedure laid down by the Act making it an offence should be followed when the offence is alleged. That principle is to be found very clearly enunciated in the judgment of Williams, J., in *Eastern Archipelago Co.* v. *Reg.* (7), where he said : " For example : it is a familiar doctrine that, though, where " a statute makes unlawful that which was lawful before and " appoints a specific remedy, that remedy must be pursued and " no other, yet, where an offence was antecedently punishable by " a common-law proceeding as by indictment, and a statute " prescribes a particular remedy in case of disobedience, that " such particular remedy is cumulative, and proceedings may be " had either at common law or under the statute ".

That principle has been followed and applied, and, so far as we know, never dissented from, in a number of cases. It was applied in *Reg.* v. *Hall* (8), a decision of Charles, J., and again in this court in *Rex* v. *Kakelo* (9). That case was concerned with offences under the Aliens Restriction Act, 1914, and the Aliens Restriction (Amendment) Act, 1919, which were punishable only in the manner prescribed by statute, namely, on summary conviction, unless the person charged with the offence claimed the

(6) [1921] 1 K. B. 635.

(7) 2 El. & Bl. 856, 879.

(8) [1891] 1 Q. B. 747, 753.

(9) [1923] 2 K. B. 793.

right under s. 17 of the Summary Jurisdiction Act, 1879, to be tried by a jury.

Sankey, J., in giving the judgment of the court in *Rex* v. *Kakelo* (10), said: "It was contended, thirdly, that the offence "under the Aliens Order was punishable by summary conviction, "and that sessions had no jurisdiction to entertain the indict-"ment. This depends upon the Aliens Restriction Act, 1914, "s. 1, sub-s. 2, and the Aliens Restriction (Amendment) Act, "1919, s. 13, sub-s. 4. The law upon the subject is elaborately "dealt with in *Reg.* v. *Hall* (11), which was a motion to quash "an indictment charging one Hall, an overseer of the poor for "the parish of St. Mary, Whitechapel, with a misdemeanor. "The motion succeeded upon the ground that an offence by an "overseer within the meaning of s. 51 of the Parliamentary "Registration Act, 1843, was not an indictable misdemeanor. "Charles, J., went at length through the cases bearing on the "matter and referred to the passage in Hawkins' Pleas of the "Crown (bk. 2, ch. 25, s. 4), which is as follows: 'Where a "'statute makes a new offence which was no way prohibited by "'the common law, and appoints a particular manner of pro-"'ceeding against the offender, as by commitment, or action of "'debt, or information, etc., without mentioning an indictment, "'it seems to be settled at this day, that it will not maintain an "'indictment, because the mentioning the other methods of pro-"'ceeding only, seems impliedly to exclude that of indictment'".

That being, as we think, clearly the law applicable to this matter, the question then arises whether this count of the indictment does allege the very offence which is created by the Act of 1927, and which the Act makes triable only as a summary offence. The submission on behalf of the prosecution was that the indictment alleged a conspiracy, which was something different from the offences which the Act create. But while it is quite clear that it may be possible to frame a charge alleging conspiracy to contravene this Act in any given set of circumstances, the court has to ascertain what is in fact alleged. In alleging the conspiracy to contravene the Act particulars are given, and those particulars are, "by, being dealers, agreeing to offer and accept consideration "as an inducement or reward for abstaining from bidding at sales "by auction". This court is of opinion that those particulars of this particular conspiracy describe in terms offences which the Act creates, or are substantially the same.

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(10) [1923] 2 K. B. 793, 795, 796. (11) [1891] 1 Q. B. 747, 753.

In those circumstances the well-known principle of law applies and this count of this indictment did not lie; it should have been quashed at the outset, and on that ground the court allows each of these appeals.

Appeals allowed.

Solicitors: *W. Gordon Hill; Lucien Fior; Cameron, Kemm & Co.; Kenneth Brown, Baker, Baker; Lieberman, Leigh & Co.; Henry Hilbery & Son; J. L. Freedman & Co.; Director of Public Prosecutions.*

R. P. C.

STEEL (M. & H.) *v.* COCKCROFT.

C. A.
1951
May 22.

Lord Tucker, Singleton and Morris, L.JJ.

[1950 No. S. 719.]

Landlord and Tenant—Rent restriction—Statutory tenancy—Mutual agreement to vary method of payment of rates—Corresponding reduction of rent—Whether new contractual tenancy thereby created—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-ss.* 1 (*b*) *and* 3.

The mother of the defendant had for a number of years occupied a dwelling-house as a statutory tenant, paying a rent which included the rates. She had become the statutory tenant on the death of her husband who was himself also a statutory tenant. In the year before her death she received from the landlords the following circular letter: "As there has arisen "from time to time some question as to the proper amount of "rates to be included in the rent, we have decided in the interest "of all concerned to allow tenants to pay their general rates direct "to the rating authority, for which purpose, therefore, we "shall advise the rates department to collect their own rates as "from June 30, 1949, in the manner most convenient to both "parties. Your rent will accordingly be reduced as from July 1 "to 8s. per week. . . . In order therefore legally to conform with the "above, we beg to give you notice to terminate your tenancy on "June 25, 1949. If you remain after that date it will be assumed "that you have agreed to the above". The tenant remained on. At her death the landlords claimed possession of the premises, but the defendant, who was living with his mother at the time of her death, opposed the claim on the ground that by their letter the landlords had put an end to the statutory tenancy and created a new contractual tenancy, and that he was therefore entitled to remain in possession. On appeal from the judge of the Salford

Hundred Court of Record, who had granted the landlords an order for possession:—

Held, that it was implicit in sub-s. 3 of s. 2 of the Rent Restriction Act of 1920, and particularly in the proviso to that sub-section, that the legislature was there contemplating that the arrangement above described could properly and legally be made and did not amount to a contravention of the Act; that the fact that a tenant and a landlord had agreed between themselves, for their mutual convenience, that the method of payment of rates should be varied did not of itself, as a matter of law, necessarily destroy the statutory tenancy and create a new contractual tenancy; and that the court was not compelled to draw the inference that the parties must be held to be intending to do that which they manifestly were not intending to do.

APPEAL from Mr. Gerrard, K.C., presiding judge of the Salford Hundred Court of Record.

In November, 1916, a dwelling-house, 46 Winnie Street, Moston, was let to one Alfred Cockcroft, the father of the defendant. From time to time notices of increase of rent were served upon the tenant under the provisions of the Rent Restriction Acts, with the result that he became the statutory tenant of the premises. On April 18, 1925, Alfred died, and his widow, Amanda Cockcroft, remained in possession as statutory tenant and paid the rent. On June 17, 1949, the landlords sent to her (and to a number of other tenants) the following letter: "Dear "Sir or Madam, As there has arisen from time to time some "question as to the proper amount of rates to be included in the "rent, we have decided in the interest of all concerned to allow "the tenants to pay their general rates direct to the rating "authority. For which purpose therefore we shall advise the "rates department to collect their own rates as from June 30, "1949, in the manner most convenient to both parties. Your "rent will accordingly be reduced as from July 1 to 8*s*. per "week. . . . In order therefore legally to conform with the "above, we beg to give you notice to terminate your tenancy on "June 25, 1949. If you remain after that date it will be assumed "that you have agreed to the above".

From that date the widow remained in occupation, paid the new rent in accordance with the above letter, and paid her rates direct to the local authority when they became due. She died on February 10, 1950, intestate, and the plaintiffs claimed possession of the premises. The defendant, the widow's son, who was living with her at the time of her death, opposed the landlord's claim to possession, contending that the letter of

June 17, 1949, had put an end to his mother's statutory tenancy and created a new contractual tenancy, and that he was therefore entitled to remain in possession.

The judge held that there was nothing in the letter in question, or in the circumstances, from which the inference could properly be drawn that the parties had intended to create a new contractual tenancy. He therefore gave judgment in favour of the plaintiffs for possession of the premises.

The defendant appealed.

J. Bamber for the defendant. By s. 15 of the Act of 1920, a tenant who by virtue of the provisions of that Act retains possession of any dwelling-house to which the Act applies is, so long as he retains possession, entitled to the benefit of all the terms and conditions of the original contract of tenancy. As between the landlords and the tenant the letter of June 17, 1949, completely changed the position. Under the Rent Restriction Acts a landlord can never bring about a transfer of rates, even if he makes a reduction in the rent, except with the assent of the tenant; and if the tenant does agree, then, it is submitted, it creates a contractual tenancy.

T. M. Backhouse for the landlords. If the defendant is right a landlord could never go to his statutory tenant and say that it would be to their mutual benefit to make some alteration in the method of payment of rates. As the judge below found, to create a new contractual tenancy there must be an intention to do so, and clearly the parties here never intended anything of the sort. The letter from the landlords was merely a notice to vary the mode of collection of rates, and not to alter the terms of the tenancy. See also sub-s. 3 of s. 2 of the Act of 1920, and the proviso (1).

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 3: "Any transfer to a tenant "of any burden or liability previously "borne by the landlord shall, for the "purposes of this Act be treated as an "alteration of rent, and where, as the "result of such a transfer, the terms "on which a dwelling-house is held "are on the whole less favourable to "the tenant than the previous terms, "the rent shall be deemed to be increased, whether or not the sum "periodically payable by way of rent "is increased, and any increase of "rent in respect of any transfer to a "landlord of any burden or liability "previously borne by the tenant "where, as the result of such transfer, "the terms on which any dwelling-house is held are on the whole not "less favourable to the tenant than "the previous terms, shall be deemed "not to be an increase of rent for the "purposes of this Act: Provided that, "for the purposes of this section, the "rent shall not be deemed to be "increased where the liability for "rates is transferred from the landlord "to the tenant, if a corresponding "reduction is made in the rent".

LORD TUCKER, stated the facts, and continued:—The landlords contended that the widow, Amanda Cockcroft, had remained on in the premises as a statutory tenant after the death of her husband, and that was not denied. But they further contended that she died a statutory tenant, and that on this basis the son was not entitled to hold over as a statutory tenant. It is with regard to that that the controversy has arisen. The defendant agreed that if his mother was a statutory tenant at the time of her death then he would not be entitled to the protection of the Rent Restriction Acts at the present time. But he said that the result of the letter of June 17, 1949, was to put an end to the statutory tenancy which had been in existence for nearly twenty-five years and to create a new contractual tenancy, and that on that basis he was entitled to remain in possession. The judge decided in favour of the landlords' contention, holding that there was nothing in this letter, and the circumstances which existed, from which the inference could properly be drawn that the parties were at that time intending to put an end to the statutory tenancy which had existed, and to create a new tenancy of a different kind, namely, a contractual tenancy. That being so, he gave judgment in favour of the landlords for possession of these premises.

The question depends on the result of two sections of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Mr. Bamber, for the defendant, relies primarily on s. 15, which provides that a tenant who retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and "be entitled to"—and those are the words on which Mr. Bamber relies—"the benefit of all the terms "and conditions of the original contract of tenancy, so far as the "same are consistent with the provisions of this Act".

I should have said that before the writing of the letter of June 17, 1949, the rates had in fact been paid by the landlords direct to the local authority, so that the terms of the original contract between the parties must have been (and this is not in dispute) that the landlords would pay the rates direct to the local authority and the tenant would pay to the landlords the agreed rent. On that basis, as I have said, from time to time the rent was increased as the rates increased. As this became inconvenient, the landlords thought that the better course would be to alter the existing arrangement and to provide that the tenant should pay the rates direct, and that there should be a consequent reduction in the amount of rent payable by her to the landlords. That was done.

In that connexion it becomes necessary to examine s. 2 of the Act of 1920, headed "Permitted increases in rent". [His Lordship read sub-ss. 1 and 3 of s. 2, and continued:] The general scheme of the section concerns the procedure to be adopted to enable a landlord to make proper, lawful increases in the rent. By the proviso to sub-s. 3 for the purposes of the section, "the "rent shall not be deemed to be increased where the liability for "rates is transferred from the landlord to the tenant, if a corres"ponding reduction is made in the rent". In the present case it is admitted that a corresponding reduction was made in the rent, so we have the provision that what was done in this case shall not be deemed to amount to an increase in rent for the purposes of this section.

The argument for the defendant is that the tenant, by remaining silent on receipt of this letter, and remaining on the premises, where she had been as a statutory tenant for over twenty-four years, thereby accepted the terms set out in the letter, and that this resulted in the creation of a new tenancy at a different rent from that in the original contract between the original parties to this tenancy. It is to be observed that the penultimate sentence of the letter: "In order therefore legally "to conform with the above, we beg to give you notice to "terminate your tenancy on June 25, 1949", is really in the circumstances of this case surplusage, and means nothing, because the tenant already was a statutory tenant, and there was no need to terminate her tenancy. The mere insertion of a paragraph purporting to terminate that which had already in fact been terminated cannot, of course, convert it into a contractual tenancy.

Then come the words on which the defendant primarily relies: "If you remain after that date it will be assumed that you have "agreed to the above". The question is whether the fact that a tenant and a landlord agree between themselves, for their mutual convenience, that the method of payment of rates shall be varied, thereby of itself as a matter of law necessarily destroys the statutory tenancy which was previously in existence (and had here been in existence for over twenty-four years) and creates a new contractual tenancy. The judge held that it did not, and I am of the same opinion. I think that examination of s. 2, and particularly of the proviso to sub-s. 3, shows that it is implicit in the section that the legislature is contemplating that what was

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done here can properly and legally be done without amounting to a contravention of the provisions of the Act. I do not think that the court is compelled to draw the inference that, when the parties have taken advantage of a provision of this kind, they must as a matter of law be held to be intending to do what in my view they manifestly were not intending to do at all, namely, to destroy or put an end to the relationship between them, which had existed over this long period, and create a new contractual tenancy. I think that the statute indicates that an arrangement of this kind may properly be made. It is an arrangement merely providing for a different method of payment of an identical sum, a mere matter of machinery, provided always that the proper corresponding reduction is made in the rent. That was done here and I agree with the judge in his view that there is nothing in the circumstances of this case or in the writing of this letter which compels the court to draw the inference that the parties intended to create a new contractual tenancy. For these reasons I think that the appeal fails.

SINGLETON, L.J. I am of the same opinion.

MORRIS, L.J. I agree.

Appeal dismissed.

Solicitors: *Guscotte, Wadham & Howard, for D. F. Bland & Co., Manchester; Rising & Ravenscroft, for Bernard Kuit, Steinart & Ashby, Manchester.*

A. W. G.

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1951
May 9.

Somervell, Denning and Birkett, L.JJ.

STEVENS *v.* SEDGEMAN.

[Plaint G. 1004]

Landlord and Tenant—Allotment—Land used for cultivating vegetables for purpose of trade or business—Six months' notice to terminate tenancy given by landlord under Allotments Acts—Whether land an agricultural holding—Validity of notice—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 1, *sub-ss.* 1 *and* 2.

A plot of land, about half an acre in extent, was rented by the defendant and used by him for cultivating potatoes and other vegetables, which he sold. The plaintiff landlord served on him a six months' notice to quit under the Allotments Acts, but the defendant claimed that the notice was invalid on the ground that the plot of land was an agricultural holding and therefore he was entitled to twelve months' notice to quit, for which notice the consent of the Minister of Agriculture and Fisheries had to be obtained. The county court judge held that the plot was an allotment and that the notice given by the plaintiff was valid. On appeal:—

Held, that, although the plot was an allotment within the definition in s. 1 of the Allotments Act, 1925, because it was used by the tenant for the cultivation of vegetables for the purposes of a trade or business it was also an agricultural holding within the meaning of s. 1, sub-ss. 1 and 2 of the Agricultural Holdings Act, 1948, and the tenancy could only be terminated by a twelve months' notice to quit under s. 23, sub-s. 1 of the Act, the size of the plot being immaterial. There was nothing in the Act of 1948 to indicate that, in applying the definition of agricultural holding in s. 1, regard should be had to the size of the piece of land in question, or, in particular to the fact that it was very small.

APPEAL from Judge Rawlins, sitting at Helston county court.

The defendant rented from the plaintiff a small parcel of land, about half an acre in extent, and used it for the cultivation of potatoes and cabbages which he sold and did not use for home consumption. The plaintiff, desiring to regain possession, served on the defendant a six months' notice to quit under the Allotments Acts. The defendant rejected the notice to quit as invalid, on the ground that the parcel of land was an agricultural holding and therefore under s. 23 of the Agricultural Holdings Act, 1948, he was entitled to twelve months' notice, which would also be subject to the permission of the Minister of Agriculture being given.

Proceedings in the action brought by the landlord for possession of the land were heard on March 13, 1951, when the county court judge, although he found that the plot was not used by the tenant mainly for the production of vegetable or fruit crops for consumption by himself or his family, and therefore was not an allotment garden, nevertheless held that it was an allotment within the meaning of the Allotments Acts, and therefore outside the Agricultural Holdings Act, 1948, so that the notice to quit was effective. The tenant appealed.

E. Brian Gibbens for the tenant. An allotment can be either an allotment garden, cultivated to produce fruit and vegetables for home consumption, or a plot of land cultivated to produce fruit or vegetables for sale as a trade or business. If it is the latter it becomes an agricultural holding within the definition in s. 1 of the Agricultural Holdings Act, 1948. The judge has found that the land in question was cultivated for the purpose of a trade or business. In the Allotments Act, 1922, it was thought necessary, "for removing doubts", to insert sub-s. 6 of s. 22, which declares that the expression "holding" in the Agricultural Holdings Act, 1908, does not include any allotment garden or any land cultivated as a garden "unless it is cultivated "wholly or mainly for the purpose of the trade or business of "market gardening". The Agricultural Holdings Act, 1923, clearly proceeded on the basis that an allotment was an agricultural holding: see s. 56, sub-ss. 1 and 2. There is nothing in the Act of 1948 which contradicts any special provision in the earlier Acts.

J. P. Comyn for the landlord. There is a plain fallacy in the argument for the defendant. Counsel is, in effect, saying that there are two sets of Acts applying to allotments, viz., the Allotments Acts and the Agricultural Holdings Acts—a complete duplicity of legislation covering the same subject-matter. Nothing could have been easier than for the legislature to say in the Act of 1948 that that Act repealed the Allotments Acts except as applied to allotment gardens. Yet the Act of 1948 does not mention allotments at all. A piece of land so small as that in question cannot come within the definition of agricultural holding in s. 1 of the Act of 1948.

SOMERVELL, L.J. The question is whether this piece of land was an agricultural holding within the Agricultural Holdings Act, 1948. The learned judge found that it was an allotment within the definition of "allotment" in the Allotments Acts. He held that in those circumstances it was outside the provisions of the Agricultural Holdings Act, and that there was no statutory provision making the notice which had been given ineffective. He therefore made an order for possession. The question, therefore, in this case, put shortly, is whether, on the findings of fact in this case, a parcel which is an allotment is within the Agricultural Holdings Act.

I think it is convenient to start one's journey through the statutes chronologically. I will begin with the Allotments Act, 1922. That Act concerned two categories of allotment—an "allotment garden" and an "allotment". Section 1, sub-s. 1 (*a*), provides: "Where land is let on a tenancy for use by "the tenant as an allotment garden or is let to any local authority "or association for the purpose of being sub-let for such use the "tenancy of the land or any part shall not (except as hereinafter "provided) be terminable by the landlord by notice to quit or "re-entry, notwithstanding any agreement to the contrary, except "by . . . (a) a six months' or longer notice". By the definition section, s. 22, "The expression 'allotment garden' means an "allotment not exceeding forty poles in extent which is wholly "or mainly cultivated by the occupier for the production of "vegetable or fruit crops for consumption by himself or his "family". The plot in this case was not, as found by the judge, an allotment garden. So far as area is concerned, it clearly was not, as it was over forty poles, and the judge was also satisfied that the tenant did not use it mainly for the production of vegetable or fruit crops for consumption by himself or his family but for sale. Section 2 provides: "Compensation on "quitting allotment gardens". By s. 3, sub-s. 2: "In the case "of any allotment within the meaning of this section (not being "an allotment garden), the tenant shall, on the termination of "his tenancy by effluxion of time, or from any other cause, be "entitled, notwithstanding any agreement to the contrary, to "obtain from the landlord compensation for the following "matters". Then there are set out the heads in respect of which compensation can be claimed. Then sub-s. 5 provides: "The Agricultural Holdings Acts, 1908 to 1921, shall, in the "case of an allotment within the meaning of this section to which "those Acts apply, have effect as if the provisions of this section "as to the determination and recovery of compensation were "substituted for the provisions of those Acts as to the determination and recovery of compensation, and a claim for compensation for any matter or thing for which a claim for compensation "can be made under this section, may be made either under "those Acts or under this section, but not under both". That has considerable importance in the argument, because it makes clear at that stage that Parliament was intending in this matter of compensation that the two codes, where they both applied, should be alternative; in other words, it was not making the special provisions for compensation contained in this section exclusive. Sub-section 7 says: "In this section the expression "'allotment' means any parcel of land, whether attached to a "cottage or not, of not more than two acres in extent, held by a "tenant under a landlord and cultivated as a farm or a garden, "or partly as a garden and partly as a farm". It is within those words that the county court judge held that this plot of land fell. It is to be noted that there is no statutory provision in this Act with regard to notice to quit in respect of an allotment.

Section 22, sub-s. 6, which was repealed by the Agricultural Holdings Act of 1923, reinforces the point as to the inference which is to be drawn from s. 3, sub-s. 5: "For removing doubts, "it is hereby declared that the expression 'holding' in the "Agricultural Holdings Act, 1908, and in the Agricultural Land "Sales (Restriction of Notices to Quit) Act, 1919, does not include "any allotment garden or any land cultivated as a garden unless "it is cultivated wholly or mainly for the purpose of the trade or "business of market gardening". The fact that it was thought necessary to remove doubts with regard to the question whether an allotment garden was a "holding" seems to suggest that an allotment was regarded as a holding. I should say at once that it does not follow that because an allotment may be a holding that all allotments are therefore holdings. For example, in order to come within the definition of agricultural holding it has to be shown that the land is used for the purposes of a trade or business, whereas no such limitation is imposed in respect of an allotment as defined by the Allotments Act, 1922.

Section 56 of the Agricultural Holdings Act, 1923, concerns allotments. By sub-s. 1: "Nothing in this Act shall affect the "operation of the Allotments Act, 1922, save that s. 22, sub-s. 6, "of that Act shall cease to have effect"—that is the section for the removal of doubt. By sub-s. 2: "In the case of any holding "to which this Act applies consisting of a parcel of land, whether "attached to a cottage or not, of not more than two acres in "extent held by a tenant under a landlord and cultivated as a "farm or garden, or partly as a garden and partly as a farm, "this Act shall have effect as if the provisions of section six of "the Allotments Act, 1922, as to determination and recovery of "compensation were substituted for the provisions of this Act as "to the determination and recovery of compensation". Those two sub-sections, read together, seem to me to reinforce the conclusion that these two codes remain side by side as alternatives, where in the circumstances of the case they are both applicable. Sub-section 1 leaves the provision of the Act of 1922 in effect, so that an application for compensation under that Act was presumably still open. Sub-section 2 makes this adjustment, and this adjustment only: it says that when the provisions of the Agricultural Holdings Act, 1923, apply, they shall apply with one modification, and one modification only, namely the incorporation of the provisions as to the determination and recovery of compensation.

The Allotments Act, 1925, by s. 1, increased the area of an "allotment" from two to five acres, and it may be that it was by accident that five was not substituted for two in s. 56, sub-s. 2, of the Agricultural Holdings Act, 1923. That, I think, is the only relevant provision in that Act.

To come to the later Acts, reference was made, though I do not think in the result it helps very much, to s. 109 of the Agriculture Act, 1947, which provides that "In this Act the "expression 'agricultural land' means land used for agriculture "which is so used for the purposes of a trade or business, or "which is designated by the Minister for the purposes of this "sub-section, and includes any land so designated as land which "in the opinion of the Minister ought to be brought into use for "agriculture: Provided that no designation under this sub-"section shall extend—(*a*) to land used as pleasure grounds, "private gardens or allotment gardens". That really does not afford much assistance, because it merely concerns land which the Minister can designate; but it does, at any rate, fit in with the submission that, whereas allotment gardens are outside what may be called the general Agricultural Holdings Act legislation, allotments, if they are in other circumstances within it, are not.

The definition of agricultural holding for the purpose of the Agricultural Holdings Act, 1948, is stated in s. 1 thus: "In this "Act the expression 'agricultural holding' means the aggregate "of the agricultural land comprised in a contract of tenancy, not "being a contract under which the said land is let to the tenant "during his continuance in any office, appointment or employ-"ment held under the landlord". By sub-s. 2: "For the "purposes of this and the next following section, the expression "'agricultural land' means land used for agriculture which is "so used for the purposes of a trade or business". Sections 23 and 24 concern notices to quit in respect of agricultural holdings as defined by the Act. They provide that there must be a year's notice; and that, when that has been given, the tenant can serve a counter-notice, after which the Minister's consent has to be obtained. Then there are certain exceptions which do not arise here. Section 100, sub-s. 10, is on similar lines to s. 56 of the Agricultural Holdings Act, 1923. It provides: "Nothing in this "Act shall affect the provisions of the Allotments Act, 1922". There does not appear there the equivalent of sub-s. 2 of s. 56,

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which was repealed by the Agriculture Act, 1947, but I do not think that any significance is to be drawn from that, because all that s. 56, sub-s. 2, did was to incorporate in what I may call the agricultural holdings code, where applicable in the case of allotments, the particular provision in the Allotments Act as to the measurement and recovery of compensation. If Parliament thought that where somebody was entitled to come under the Agricultural Holdings Act, 1948, the whole of that Act, including its provisions as to the measure and recovery of compensation, should apply, one would have expected that sub-section to disappear.

The submission on behalf of the landlord was (and this was the view taken by the judge) that on the findings of fact this land was an allotment, and that therefore it was ipso facto outside the Agricultural Holdings Act, 1948. Counsel also made a subsidiary submission, based on the view that this was, as the evidence shows, a very small holding. I cannot find anything in the Act to indicate that in applying the definition in s. 1, subss. 1 and 2, one should have regard to the size of the holding. In my view, the various provisions of the statutes in the two codes to which I have referred lead to the conclusion that it cannot be said that because this plot is an allotment within the definition it is ipso facto outside the Agricultural Holdings Act, 1948. It seems to me that the provisions have expressly preserved the two codes as alternatives.

Therefore, as I have come to the conclusion that this was land which was plainly within the definition of agricultural holding, and that the fact that it is within the definition of allotment does not take it out of the provisions of the Agricultural Holdings Act, 1948, it follows that the provisions of that Act with regard to notice to quit apply in respect of the tenancy of this plot of land, and that, as admittedly they have not been complied with, the judge's order must be set aside. For these reasons I think that this appeal must be allowed.

DENNING, L.J. I agree. The distinction between an allotment garden and an allotment is important. An allotment garden is an allotment of less than a quarter of an acre where a man grows vegetables or fruit for himself and his family. It is not an agricultural holding, and a notice to quit has to be a six months' notice. An allotment, on the other hand, which is used by a man for growing fruit or vegetables for the purposes of a trade or business, is an agricultural holding, and that can only be determined by twelve months' notice and only for certain specific reasons, which are set out in the Agricultural Holdings Act, 1948. There is nothing in the Act to say that an allotment must be of any particular size in order to qualify to be an agricultural holding. The only essential requisite is that it must be used for the purposes of a trade or business. The judge has found that that essential requisite was present. The fact that it was only half an acre, or a little less, does not deprive it of the status of being an agricultural holding. I agree, therefore, that the appeal should be allowed.

BIRKETT, L.J. I agree. The decision of the apparently simple question at issue here has necessitated an examination of this most complicated legislation of the past twenty-five years. Somervell, L.J., has traced the legislation in so far as it applies to the present situation, and no useful purpose would be served by going over it all again.

The judge decided this case in the court below by holding that six months' notice was sufficient, because this land was an allotment and not an agricultural holding, which would require a twelve months' notice under the Agricultural Holdings Act. After reading his careful judgment, I can quite see how he came to that conclusion. He said in his judgment: " I have so found " that the land is used for agriculture for the purposes of a trade " or business. . . . Mr. Hine then pointed out that by s. 100, " sub-s. 10, of the Agricultural Holdings Act, 1948, nothing " therein is to affect the provisions of the Allotments Act, 1922 ". The judge went on: " I hold this land is an ' allotment ' within " the meaning of the Allotments Act, 1925, which I observe has " not been repealed by the Agricultural Holdings Act, 1948 ". I think, therefore, that what the judge did was to misunderstand the effect and meaning of sub-s. 10, and that the construction which my Lord has put upon it is the true one. What I think was not adequately realized was that there were here, in this complicated legislation, two codes which could exist side by side as alternatives.

With regard to the point, which has a great deal of force, that it seems a little absurd to bring a small piece of land within the rather complicated machinery of the Act of 1948 concerning notice and counter-notice and the intervention of the Minister, that I do not think is a matter for this court. The case could not be decided merely on the fact that this was a very small piece of land.

Appeal allowed.

Solicitors: *Burton, Yeates & Hart, for Vivian Thomas & Jervis, Penzance; Balderston, Warren & Co., for Ratcliffe, Son & Henderson, Helston.*

A. W. G.

1951
Jan. 18.

Lord Goddard, C.J., Hilbery and Devlin, JJ.

TAYLOR *v.* PARRY.

Bastardy—Application for affiliation order—"Single woman" Mother remarrying after birth of bastard child—Husband no longer liable to maintain wife's bastard child—Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3*; Poor Law Amendment Act,* 1930 (20 *Geo.* 5, *c.* 17), *s.* 14, *sub-s.* 3*; National Assistance Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 1, 42, *Sch.* 7.

A woman who before marriage gives birth to a child of which the man whom she subsequently marries is not the father cannot after marriage and while she is living with her husband obtain an affiliation order against the natural father of the illegitimate child, notwithstanding the fact that by virtue of the provisions of the National Assistance Act, 1948, her husband is no longer under any obligation to maintain that child.

CASE STATED by Reading justices.

At a court of summary jurisdiction on July 19, 1950, a complaint under the Bastardy Laws Amendment Act, 1872, was preferred by the respondent against the appellant for that she was delivered of a bastard female child on December 18, 1948, of which child, she alleged, the appellant was the father. At that date the respondent was a widow, her husband to whom she had been married in 1937 having died in 1945. Later she married her present husband, and was living with him at the time when she laid her complaint against the appellant. It was conceded on behalf of the respondent that before the passing of the National Assistance Act, 1948, a married woman living with her husband could not bring affiliation proceedings, as not being a single woman; but it was contended on her behalf that the

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

basis of that rule was that her husband was liable to maintain her illegitimate children born before the marriage and there could not be a double liability for the support of a bastard child, and since by s. 62 of and Sch. VII to the Act of 1948, s. 14 of the Poor Law Act, 1930 (which re-enacted in substance s. 57 of the Poor Law Amendment Act, 1834), was repealed, and by virtue of the provisions of s. 42 of the Act of 1948 (1) a husband was no longer liable to maintain the illegitimate child of his wife, no question of dual liability could arise and there was nothing to prevent the justices from applying the law as it stood before the passing of the Act of 1834 and, therefore, from holding that though the respondent was living with her husband at the time of the complaint, she was nevertheless to be regarded as a "single woman" within the meaning of the Bastardy Laws Amendment Act, 1872.

The justices being satisfied that the appellant was the putative father of the child, and that the respondent's contention was well founded, adjudged that the appellant should pay 10*s*. a week for the maintenance of the child.

The putative father, who was not represented before the justices, appealed.

Cusack for the appellant. *Jones* v. *Davies* (2) was not cited to the justices. That decision shows quite plainly that a married woman, who at the date of making an application is living with her husband, cannot obtain a bastardy order in her favour. In view of that decision the order of the justices was plainly wrong.

Widgery for the mother. It is established by the authorities that where a woman is married at the time of the birth of her illegitimate child she cannot be considered "a single woman" for the purpose of obtaining a bastardy order, unless she is separated from her husband, for example, because he is overseas on military service: *Jones* v. *Evans* (3). But where a married woman is single at the time of the birth of her bastard child she comes within the expression "a single woman" to be found in

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(1) National Assistance Act, 1948, s. 42, sub-s. 1: "For the purposes of "this Act—(*a*) a man shall be liable "to maintain his wife and his children, and (*b*) a woman shall be "liable to maintain her husband and "her children".

Sub-section 2: "The reference in "para. (*a*) of the last foregoing sub-"section to a man's children includes "a reference to children of whom he "has been adjudged to be the putative "father, and the reference in para. "(*b*) of that subsection to a woman's "children includes a reference to her "illegitimate children".

(2) [1901] 1 K. B. 118.

(3) [1944] K. B. 582.

s. 3 of the Bastardy Laws Amendment Act, 1872, unless upon marriage she acquires a husband who is liable to maintain her illegitimate children, for there cannot be a dual liability for the maintenance of a bastard child: see *Stacey* v. *Lintell* (4).

However, the principle of *Stacey* v. *Lintell* (4) no longer applies, since s. 14 of the Poor Law Act, 1930, which requires a husband to maintain his wife's illegitimate children, has been repealed by s. 1 and s. 62 of the National Assistance Act, 1948. Accordingly the decisions prior to 1878 are relevant in construing the expression "a single woman" which occurs in all the Bastardy Acts.

In *Reg.* v. *Collingwood* (5) an order for the maintenance of a bastard child was upheld, though it appeared by the order that the mother was a married woman. In *Rex* v. *Luffe* (6) an order was made on the putative father of the bastard child of a married woman, since it appeared that it was born out of wedlock.

LORD GODDARD, C.J. The justices, or their clerk, have stated the case in a way which indicates the extreme trouble and care which they took with it. They referred to a large number of cases, and a considerable number of statutes, beginning with 18 Eliz. c. 3, and 43 Eliz. c. 2, and including 6 Geo. 2, c. 31; and they have set out in the case a reasoned opinion which entitled them, in their view, to come to the conclusion that this woman could be regarded, notwithstanding her marriage, as a single woman. But after having had the advantage of hearing a very full argument from Mr. Widgery and a concise argument from Mr. Cusack on behalf of the putative father who put the case as being almost beyond argument, I am clearly of opinion that this court must allow the appeal.

By the Bastardy Laws Amendment Act, 1872, the governing Act in bastardy matters at the present time, an application for an order in bastardy can only be made by a single woman. That conception goes back a great many years to a time when bastardy orders could be obtained, not by the mother, but only by the parish officers who were or might be liable for the maintenance of the bastard.

The courts have for many years held that where a woman is living in such circumstances that, though she is married, she is, in effect, a single woman, because she is living completely apart from her husband, she may obtain a bastardy order as a single woman. The last case on the subject is *Jones* v. *Evans* (7). The headnote thus concisely states the decision: "The wife of "a soldier serving compulsorily overseas, who during his absence "has committed adultery, which has not been condoned, is a "'single woman' within the meaning of s. 3 of the Bastardy "Laws Amendment Act, 1872, and, therefore, entitled to lay a "complaint in bastardy". Atkinson, J., delivering the judgment of the court, referred to *Rex* v. *Luffe* (8), *Reg.* v. *Collingwood* (9), and *Reg.* v. *Pilkington* (10), and summed the matter up thus (11): "In our view the facts in the present case constituted "the appellant a 'single woman'. There was a de facto "separation of considerable length and an uncondoned matri-"monial offence which had lost for the complainant her title to "maintenance by her husband and her right to live with him. "The appeal, therefore, succeeds".

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(4) (1878) 4 Q. B. D. 291.

(5) (1848) 12 Q. B. 681.

(6) (1807) 8 East 193.

Mr. Widgery's argument comes to this, that the only reason why, in the case of a bastard child born to a woman before she married, she was not entitled to be regarded as a single woman if she applied for a bastardy order after she married, was that by her marriage she obtained a husband who by law was bound to maintain her and her child. By the National Assistance Act, 1948, however, s. 14 of the Poor Law Act, 1930, which put the obligation of maintaining the wife's illegitimate child on the husband, was repealed. Section 42 of the Act of 1948 provides: "For the purposes of this Act—(*a*) a man shall be liable to "maintain his wife and his children, and (*b*) a woman shall be "liable to maintain her husband and her children". That Act, of course, puts the obligation of maintaining an illegitimate child on the mother, because that child is not her husband's child; and if the illegitimate child had been born before marriage no question of access or non-access could arise; the child would not be the husband's and the obligation to maintain the child is on the mother.

But merely because the Act of 1948, which contains no reference to the Act of 1872 at all and does not purport to refer to the law with regard to the application for and obtaining of bastardy orders, has so provided by s. 42, we cannot, as it seems to me, possibly hold that a woman living with her husband at

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(7) [1944] K. B. 582.
(8) 8 East 193.
(9) 12 Q. B. 681.
(10) (1853) 2 E. & B. 546.
(11) [1944] K. B. 582, 590.

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the time when she applies for the order is a single woman: it would be a reductio ad absurdum. There is nothing absurd in holding that a married woman whose husband has deserted her or is serving a sentence of imprisonment or has been sent overseas on military or naval service is, for the purpose of the Bastardy Acts, a single woman, because there she is living by herself entirely. But it would be taking a very strong course to hold that this Act has overruled a long line of authority, including such an authority as *Jones* v. *Davies* (12), which, as is shown in the headnote, lays down in the clearest possible terms: "A married woman, who at the date of the application "is living with her husband, cannot obtain an order for the "affiliation of her bastard child under the Bastardy Laws "Amendment Act, 1872, s. 3".

Had the attention of Parliament been called to the fact that the considerable alteration in the law brought about by s. 42 of the Act of 1948 would or might prejudice the position of a married woman who before marriage had given birth to an illegitimate child, it might have included in the Act some provision to cover the case, for one can see that it is a hard case: the husband is no longer liable to maintain his wife's illegitimate child which she had at the time he married her, and the wife cannot apply to the justices for an order against the putative father. But unless we can find something in the Act which meets that point we cannot possibly hold, that by an alteration of the law of that sort in the Act of 1948 the whole of what has been the law in bastardy matters for a very long time and affirmed many times has been changed, and that we are accordingly at liberty to read the words "single woman" as meaning a married woman whose husband is now no longer under an obligation to maintain her bastard child.

It might be a very good thing, if this Act were to come up for amendment, that this matter should be brought to the attention of Parliament, in order that Parliament might consider whether to make an alteration in the law; but it is far too much to ask this court to say in face of all the authorities which have been cited, that a married woman living with her husband can by any argument or reasoning be turned into a single woman within the meaning of the Bastardy Acts.

For these reasons I am of the opinion that the justices came to a wrong determination, and that their order must be quashed.

(12) [1901] 1 K. B. 118.

HILBERY, J. I am of the same opinion. I think Mr. Cusack was not overstating it when he said that this order of the justices could not stand in face of such a decision as *Jones* v. *Davies* (13). I agree that the order of the justices was wrong.

DEVLIN, J. I also concur.

Appeal allowed.

Solicitors: *Preston, Lane-Claypon & O'Kelly, for G. L. Jones. Slough; Torr & Co., for Francis & Parkes, Reading.*

(13) [1901] 1 K. B. 118.

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April 13.

Somervell, Singleton and Denning, L.JJ.

[1950 W. 925.]

Arbitration—Sale of goods—Chain of contracts—Original contract incorporating conditions and rules of London Dried Fruit Trade Association relating to arbitration—Award condition precedent to legal proceedings—Time limit for application for arbitration—Writ issued by ultimate purchaser—Original purchaser brought in as fourth party—Fourth party seeking to bring in original seller as fifth party—Stay of fifth party proceedings—Arbitration Act, 1950 (14 *Geo.* 6, *c.* 27), *ss.* 4, 25, *sub-s.* 4.

Where the parties to a contract have agreed that any dispute arising out of that contract shall be submitted to arbitration and that an award shall be a condition precedent to any legal proceedings in respect of that dispute, the court will grant a stay under s. 4 of the Arbitration Act, 1950, unless in its discretion it deems it a more convenient mode of trial to have the matter tried directly in the action. It is not material that the time fixed for demanding arbitration has run out, for to hold otherwise would mean that one party to the agreement could defeat the rights of the other party to have a dispute settled by this procedure merely by waiting until the time had elapsed and then bringing an action. Moreover, under s. 27 of the Act the court has power to extend the time if it is of opinion that undue hardship would otherwise be caused.

A firm of fruit importers, members of the London Dried Fruit Trade Association, sold to another firm, also members of the association, two consignments of figs which they were importing from Greece. The contract of sale incorporated the rules of the association, which made it a condition that neither buyer nor seller nor any person claiming under either of them should bring any action against the other of them in respect of any dispute until it had been settled by an arbitration award. The figs, which were resold three times, proved to be deficient in weight, and the last purchaser sued his immediate vendor for damages. By that time the period allowed by the rules of the association for demanding arbitration had expired. The defendant in the action joined his vendor as third party, and he in turn passed the claim up to his vendor, who then sought to bring in the importer and original vendor. The last-named applied under s. 4 of the Arbitration Act, 1950, for an order to stay proceedings in the action, and now appealed from the refusal of the judge to make an order.

Held, that the applicants were entitled to have the dispute settled by arbitration, and a stay of the proceedings brought by the fourth party ought to be granted.

Dictum of Lord Selborne, L.C., in *Willesford* v. *Watson* (1873) L. R. 8 Ch. 473, 479, and observations of Lord Cozens-Hardy, M.R., and Phillimore, L.J., in *Smith, Coney & Barratt* v. *Becker, Gray & Co.* [1916] 2 Ch. 86, 95, 101, applied.

APPEALS from orders of Parker, J., and Slade, J.

Bakirzis & Co. Ld., fruit importers and members of the London Dried Fruit Trade Association, sold through brokers to a firm called P. Abraham & Co., other members of the association, two consignments of figs which they were importing from Greece. The contract of sale incorporated the rules of the association, which by r. 21 made it a condition precedent that neither buyer nor seller nor any person claiming under either of them should bring any action against the other of them in respect of any dispute until it had been settled by arbitration. Rule 21A provided that, should a demand for arbitration not have been made in writing within two months after the arrival of the goods or the latest date on which in the ordinary course they should have arrived, the right to arbitration was to be considered to be waived and absolutely barred.

The figs were resold by Abraham & Co. and passed through a chain of contracts to W. Bruce Ld., who purchased them from J. Strong. When the figs arrived in this country on December 2, 1949, samples were examined and it was found that some of the packets which were labelled as weighing six ounces were deficient in weight. On March 14, 1950, by which time the two months allowed by r. 21A for demanding arbitration had expired, W.

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Bruce Ld. issued their writ claiming damages from the defendant Strong. Other party notices passed the claim up to Abraham & Co., who thereupon sought to bring in as fifth parties Bakirzis & Co. The last named then applied to a master, under s. 4 of the Arbitration Act, 1950 (1), for an order staying proceedings in the action. The master refused to make the order and on appeal to him Parker, J., upheld the master's decision. Subsequently, Slade, J., in chambers, upheld a further order of a master, made under s. 25, sub-s. 4, of the Act, that the clause in the contract providing for arbitration as a condition precedent to the bringing of an action should be treated as of no effect as regards the particular dispute.

Bakirzis & Co. Ld. appealed from both orders.

Beney, *K.C.*, and *Dare* for Bakirzis & Co. Ld.

Havers, *K.C.*, and *Ahern* for P. Abraham & Co.

The arguments are sufficiently stated in the judgments.

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(1) Arbitration Act, 1950, s. 4, sub-s. 1: "If any party to an "arbitration agreement, or any person "claiming through or under him, com-"mences any legal proceedings in any "court against any other party to the "agreement, or any person claiming "through or under him, in respect of "any matter agreed to be referred, "any party to those legal proceedings "may at any time after appearance, "and before delivering any pleadings "or taking any other steps in the "proceedings, apply to that court to "stay the proceedings, and that court "or a judge thereof, if satisfied that "there is no sufficient reason why the "matter should not be referred in "accordance with the agreement, and "that the applicant was, at the time "when the proceedings were com-"menced, and still remains, ready "and willing to do all things neces-"sary to the proper conduct of the "arbitration, may make an order "staying the proceedings".

Section 25, sub-s. 4: "Where it is "provided (whether by means of a "provision in the arbitration agree-"ment or otherwise) that an award "under an arbitration agreement shall "be a condition precedent to the "bringing of an action with respect "to any matter to which the agree-"ment applies, the High Court, if it "orders (whether under this section "or under any other enactment) that "the agreement shall cease to have "effect as regards any particular dis-"pute, may further order that the "provision making an award a condi-"tion precedent to the bringing of an "action shall also cease to have effect "as regards that dispute".

Section 27: "Where the terms of an "agreement to refer future disputes to "arbitration provide that any claims "to which the agreement applies shall "be barred unless notice to appoint "an arbitrator is given or an arbi-"trator is appointed or some other "step to commence arbitration pro-"ceedings is taken within a time fixed "by the agreement, and a dispute "arises to which the agreement "applies, the High Court, if it is of "opinion that in the circumstances of "the case undue hardship would other-"wise be caused, and notwithstanding "that the time so fixed has expired, "may, on such terms, if any, as the "justice of the case may require, but "without prejudice to the provisions "of any enactment limiting the time "for the commencement of arbitration "proceedings, extend the time for such "period as it thinks proper".

SOMERVELL, L.J., stated the facts, and continued:—The contract between the fifth party and the fourth party was made through brokers, as required by the rules of the London Dried Fruit Trade Association. It is a contract on the terms, conditions and rules of the London Dried Fruit Trade Association of which both the fifth and the fourth parties were members. There are four rules to which it is necessary to refer. By r. 46, which applies to c.i.f. contracts, of which this was one, "Claims for "loss in weight not made by the buyer to the merchant through "the broker within one month of the landing accounts for not "less than 85 per cent. of the parcel being available, shall be "inadmissible".

By r. 50, "Any dispute arising out of a contract, shall be "determined by arbitration in London, in accordance with the "rules of the association".

By r. 21, "All disputes upon questions of fact or law, arising "from time to time out of a contract, whether between the "parties thereto, or between one of the parties thereto and the "trustee in bankruptcy of the other party, shall be referred to "arbitration. Neither buyer, seller, trustee in bankruptcy, nor "any other person claiming under either of them, shall bring any "action against the other of them in respect of any such dispute, "until the same has been settled by the arbitrators, or by the "committee of appeal, as the case may be, and it is expressly "agreed that the obtaining an award from either tribunal, as the "case may be, shall be a condition precedent to the right of "either contracting party to sue the other or take any other legal "proceedings in respect of any claim arising out of such "contract".

By r. 21A, "Any demand for arbitration shall be made in "writing within two months after the arrival of the goods, or "within two months of the latest date on which they should in "ordinary course have arrived if shipped according to contract. "Should the demand not be so made, the same shall be considered to be waived and absolutely barred".

Those are the broad facts.

The master refused the application for a stay. On appeal, Parker, J., confirmed that order. The fifth party appeals from that decision to this court.

After Parker, J., had refused a stay the fourth party took out a summons under s. 25, sub-s. 4, of the Arbitration Act, 1950, and it is in respect of that summons that the second appeal arises. The broad position, of course, apart from that provision, was that, if there was what I will call an ordinary submission to arbitration and nothing expressly or impliedly making an award a condition precedent, then if a writ were issued in respect of the subject-matter which could be claimed to be covered by the arbitration clause, and the defendant desired to go to arbitration, he had to take out a summons to stay, which he has been able to do since the Common Law Procedure Act, of 1854; and then prima facie, as the cases show, he would be entitled to a stay. If he does not take out a summons to stay then that is an end of it, and he cannot rely on the reference to arbitration. But if the arbitration clause is in what is often called the "Scott and "Avery" form, that is, making an award a condition precedent, then he can rely in his defence on the failure to observe the condition precedent. Sub-s. 4 provides that the High Court can order that the agreement shall cease to have effect as regards any particular dispute, as Slade, J., has ordered here, in effect striking the condition precedent out of the contract. Unless that is done, so far as I can see, Parker, J.'s order would really be inoperative because the proceedings would have gone on and the fifth party could then have relied on failure to perform a condition precedent. [His Lordship read s. 27 of the Act, and continued:] It was therefore possible, and for all I know may still be possible, for a party to apply to the court under that section and ask it to extend the time of two months within which, under r. 21A of the association's rules, a demand for arbitration had to be made.

Mr. Beney, who opened the case, was not present before the master or the judge. He had on instructions gathered that the only indication, as it were, given by Parker, J., of the reason for his decision was that if these proceedings were stayed the same subject-matter of dispute (though not necessarily the same issues in all respects as between the different parties)—the questions whether the goods were short, how many of them were short, what damage followed from the fact that goods cannot be sold in this country with an untrue label—would have to be litigated in the proceedings in the High Court and they would have also to be litigated before the arbitrator. Mr. Havers told us that, although that point was argued, there were other points; and, of course, he is entitled to rely here on all points which were raised, and, indeed, points which were not raised. If the judge had in the main depended on this point—I do not say that he did—I would feel that it was a decision which could not stand. Under the existing third-party procedure it is possible, and in many

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cases may be very useful, to have before the court the various parties where there is what is usually called a chain of contracts. It is the last man who is landed with the goods who suffers the immediate damage, and if the terms of the contracts are sufficiently similar that claim could be passed up to the person who originally contracted to sell the goods, the parties up the chain being brought in. But the question is whether, when there is a contract, as here, between two parties under which both of them, being members of an association, agree that disputes between them shall be bound by a code worked out by those in the trade, with provisions which have been found to work justice or to work satisfactorily as between members of that trade, and to save money, time and costs, a party is to be deprived of that term in his contract because the person to whom he has sold sold on to someone who is subject to or submits to proceedings in court.

On the general question of the right to stay Lord Selborne, L.C., in *Willesford* v. *Watson* (2) said: "Then we are told that "this is an arbitrary tribunal, final and without appeal, and so "forth, and that these are not fit questions to go before the "arbitrator. But I think that the Legislature and the Act of "Parliament (3) under which the court is now asked to act have "given the answer to that argument. If parties choose to determine for themselves that they will have a domestic forum "instead of resorting to the ordinary courts, then since that Act "of Parliament was passed a prima facie duty is cast upon the "courts to act upon such an agreement".

Various observations to the same effect were made in *Smith, Coney & Barratt* v. *Becker, Gray & Co.* (4). Lord Cozens-Hardy, M.R., said (5): "In my opinion there is nothing in the "present case which justifies a contention that this is not a fit "question to be decided by the arbitrators. It is a question "which falls within the express language of the arbitration clause, "and in my opinion it would be very wrong for us to say that "this ought not to go to the tribunal which the parties them"selves have selected, but ought to be kept in this action in "some form. In my opinion the judgment of Warrington, J., "was perfectly right on both points". Swinfen Eady, L.J., added a general observation at the end of his judgment to the same effect.

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(2) (1873) L. R. 8 Ch. 473, 479.

(3) Common Law Procedure Act, 1854.

(4) [1916] 2 Ch. 86.

(5) Ibid. 95.

Phillimore, L.J., discussed the point in rather more detail. He referred to the class of case which undoubtedly exists in which the court have refused a stay, and said (6): "Then the only "point left to consider is whether there are special reasons for "preventing the parties from applying to that domestic tribunal "to which they have agreed. There are cases in which the court "has exercised a discretion where it has appeared that there is "nothing but a point of law which will have to be decided, and "where, if the matter goes to arbitrators, the arbitrators could "be compelled to send the case back to the courts of law by "one or other of the procedures known under the Arbitration "Act. But, to begin with, in this particular case the parties "have intended, if they lawfully can, to make the decision of "their domestic tribunal conclusive and independent of any act "by a court of law; and, secondly,—and this is the matter which "weighs most with me—an arbitration is necessary whatever "view is taken, because an award by the arbitrators is a condition precedent to the defendants' right to recover that sum of "money to which they claim to be entitled. When the court "has exercised its discretion and has refused to stay an action "because it sees that the matter is merely a point of law, it "has done so upon the principle that it is a more convenient "mode of trial to have the matter tried directly in the action "instead of indirectly by an arbitration and the statement of a "case, but it has never refused to stay an action where it is "obvious that the case must go to arbitration, and the case must "go to arbitration where an award is a condition precedent".

As an award is a condition precedent here, on the principle laid down by Phillimore, L.J., at any rate, the court clearly should grant a stay. Of course Phillimore, L.J., was not considering the point which I am considering at the moment—whether it makes any difference that the buyer has sold on, that the buyer from him has sold on again, and that legal proceedings have been invoked in respect of the general subject-matter of the claim which the fourth party desires to make against the fifth party. In my view, without laying down an absolute rule, for there must be a discretion to look at all the circumstances of the case, prima facie all these matters are res inter alios acta and irrelevant to the consideration of the issue raised as between these two parties who agreed to this arbitration procedure, and there is in form, as here, a claim by the fourth party bringing the fifth party in. If that were the only point, I should definitely say that the proceedings should be stayed.

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(6) [1916] 2 Ch. 86, 101.

A further point was made which depends to some extent on the view taken of the facts. Mr. Havers' submission with regard to the facts was that there was nothing in the nature of what could be called a dispute, or which could have been made the subject-matter of a claim and a demand for arbitration within the time. Of course, it may well be that a party can demand arbitration before all the facts are known if he realizes that a claim may result.

Mr. Beney referred to the various letters which were written about the shortage and what was to be done about it. The most important document, as my brother Singleton said in the course of the argument, is a certificate of survey by one Yore, which was sent by the defendant to the third party. The third parties were very closely associated with the fourth party and I am satisfied that this must have come to the attention of the fourth party. This is a survey with regard to the shortages of weight and so on, and states: " A case was selected haphazard from pile and " packages were weighed with following results:—1 @ 5 oz., " 3 @ 5¼ oz., 7 @ 5½ oz., 1 @ 6 oz.; making an average of 1 in " 12 weighing the full 6 oz. nett; and the removal marked 6 oz. " would necessitate unwrapping of cellophane covering of each " individual packet and re-wrapping same with correct weight; " but as this would be a long and costly operation, undersigned " is of opinion that the matter should be submitted to arbitra- " tion ". There, therefore, was the opinion of the man who gave his certificate at the request of the defendant and sent to the third parties. He thought that there should be arbitration on the facts as then known. The fourth parties knew of it or, at any rate, they could have made inquiries and found out what the position was; and it is certainly quite plain from their own letters that they knew all about it. There is correspondence between them and the fifth party with regard to what should be done.

Mr. Havers submits that there was no real dispute as at that date. I think that there was. He then submitted, and this in a sense is independent of that point, that s. 4 of the Arbitration Act, 1950, the section under which the fifth party applied to stay, cannot apply when the time for the demand for arbitration has run out because the court has to be satisfied that the applicant was, at the time when the proceedings were begun, and still remains, ready and willing to do all the things necessary to the proper conduct of the arbitration. Mr. Havers asks how a man can say that he is ready and willing to do all things necessary for the proper conduct of the arbitration when he is saying that the time for arbitration has elapsed and, therefore, an arbitration cannot be got onto its legs. That proposition would mean that, where there is a time limit for a demand for arbitration or the appointment of an arbitrator, or whatever it may be, one party could defeat the rights of the other to have a dispute settled by this procedure merely by waiting until the time had elapsed and then issuing a writ and saying: "You cannot "say you are ready and willing because under the rule the time "has elapsed". I cannot think that that is right, and I do not think that *Young* v. *Buckett* (7) to which we were referred, a decision of Fry, J., referred to in Russell on Arbitration, really helps on the matter. I do not think that the point was taken there in the sense in which it is sought to be taken here. Those words in s. 4 mean that in respect of any matter connected with arbitration, according to the contract for arbitration, the applicant must show his readiness and willingness; but they do not mean that he cannot get a stay if the other party has allowed the time to run out. I think, in considering this point on the construction of those words of the section, that it is relevant to remember what I have already referred to, namely, that under s. 27 the court has power to extend the period of time which has elapsed in this type of agreement. I do not propose to lay down an absolute rule that the lapse of time might in no circumstances be a relevant consideration for a judge to consider, but I cannot accept Mr. Havers' contention that in the circumstances of this case, particularly having regard to what I read on the suggestion that the matter should be referred to arbitration back in December, when the time limit had not expired, it is a good ground for depriving the fifth party of his prima facie right to get a stay and then to say that the period has elapsed. Whether on that basis the fourth party could have applied, or can apply, to the court with any measure of success is a matter on which I desire to express no opinion at all, because it does not arise now.

Another point argued before the judge, which I am bound to say does not appeal to me, is that in this class of chain-contract case the claim as between the fourth party and the fifth party, as here, may in certain events be unascertainable in quantum until the position as between parties lower down the chain has been determined. The defendant may be entitled to add costs which he has incurred as against the plaintiff and recover them from the third party, and so on. Again I express no opinion how that would work out; but if that is right I see no difficulty in saying that the provisions as to compulsory arbitration hold good. The reason for these time limits is, of course, that matters like short weight in particular should be raised promptly when really reliable evidence can be got. There would be no difficulty in the arbitrator hearing the evidence on matters of fact which can be decided promptly, at that time, and leaving over the determination of the final quantum of damage if it were necessary.

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(7) (1882) 51 L. J. (Ch.) 504.

Mr. Havers took a point of illegality, but I think that we are all agreed that that did not really arise in the decision of this issue. My conclusion therefore is that the appeal against the order of Parker, J., should be allowed, and so far as it is based on the fact that there were these proceedings in court, I think, with respect, it is not a circumstance which on the facts of this case would justify a refusal to stay for the reasons which I have given. I also think the other points taken fail.

That being so, the decision which Slade, J., made in favour of the fourth party under s. 25, sub-s. 4, the effect of which was that the condition precedent could not be relied on, does not arise and must be set aside. We have a note of what Slade, J., said and I will only say that prima facie it seems to me that that judge was right in doing what he did on the basis that Parker, J.'s order was going to stand. Parker, J.'s order was subject to appeal, but it was obviously right and proper that Slade, J., should make his order on the basis of Parker, J.'s order. For these reasons I think the appeals must be allowed.

SINGLETON, L.J. I am of the same opinion and I have little to add to the judgment which my Lord has delivered. The parties to this appeal, the fourth party and the fifth party, by their contract brought in the rules of the London Dried Fruit Trade Association, one of which, r. 21, provides that all disputes upon questions of fact or law shall be referred to arbitration and that the obtaining an award shall be a condition precedent to the right of either contracting party to sue. That was introduced into the contract.

The goods which were the subject of the contract were passed from hand to hand. A complaint was made by the ultimate purchasers and some time afterwards proceedings were started by them and they are the plaintiffs in the action. The defendants brought in a third party, and the third party brought in a fourth party. It was said at one time that it was a good reason why the master and the judge should refuse to stay the action against the fifth party, that there were proceedings by and against other parties. I am satisfied that that of itself is not sufficient to deprive those who rely upon an arbitration clause of their right to have the dispute determined by arbitration. They had chosen for themselves a forum and prima facie a duty is cast upon the court to act upon that agreement.

What gave me most trouble in the course of the argument was the point raised by Mr. Havers under the concluding words of s. 4, sub-s. 1, of the Arbitration Act, 1950. He submitted that the court ought not to stay the action and direct an arbitration because it could not be said that the party asking that that should be done still remained ready and willing to do all things necessary for the proper conduct of the arbitration. He referred to the affidavit of the fifth party, the appellant, in which he claimed to set up not only r. 21, but r. 21A, which provides: "Any demand "for arbitration shall be made in writing within two months after "the arrival of the goods, or within two months of the latest date "on which they should in ordinary course have arrived if shipped "according to contract. Should the demand not be so made, the "same shall be considered to be waived and absolutely barred".

Mr. Havers drew our attention to the concluding paragraph of the affidavit of the fifth party in which he raised a question under r. 21A and said: "No demand for arbitration was made within "the said period of two months, or at all". Thereupon counsel submitted that a man who said, "I am not asking to have an "arbitration because the time for an arbitration has run", could not be said to remain ready and willing to do all things necessary in the proper conduct of the arbitration. I can see that in certain cases that kind of question might raise matters for the consideration of the judge on an application of this kind. The judge has to exercise what is described in one case as a primary discretion in the matter. When he has to exercise that discretion he must of course look at the facts, and when the facts of this case are examined it is found that by the document of December 10, sent with the letter of December 14, the person who had examined the goods expressed the opinion that the matter should be submitted to arbitration. This was within a short time of the arrival of the goods, so that it was open to the fourth party to ask for an arbitration long before the two months expired. I do not think that he ought to be allowed to sit and do nothing until time has run and then say that it is too late for an arbitration, and

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therefore there ought not to be a reference to arbitration. He himself has entered into an agreement as to the manner of settling disputes and by that he remains bound.

I would only add this: I can see some difficulty about the application of r. 21 in every case. If it appears that without any fault on the part of the one who desired the dispute to be determined in a court of law time had run before a dispute arose, so that he was barred from arbitration, I think it might well be that the judge who had to consider an application of this kind would in his discretion take that into account in determining whether or not there should be a stay. That really does not arise in the circumstances of this case, as a dispute had arisen, I am now satisfied, well within the time and to the knowledge of the fourth party. For these reasons I agree that the appeals should be allowed.

DENNING, L.J. I only wish to add a few words on the point raised by Mr. Havers on the last words of s. 4 of the Arbitration Act, 1950. The clause in this contract said that any demand for arbitration must be made within two months after the arrival of the goods. The buyer did not make a demand for arbitration within that time, but later brought proceedings in the courts. The seller now says the proceedings should be stayed even though the time for arbitration has already expired; and it is clear that if the dispute does go to arbitration he intends to insist on the contractual time limit as an answer to the arbitration. At first I was inclined to think that the seller could not do that, because he would be saying in one and the same breath that the claim ought to go to arbitration and also that he was unwilling to go to arbitration. But the answer is that the High Court has power, in case of undue hardship, to extend the time for arbitration. That was the machinery provided by the Act for the very difficulty which has arisen. Any other view would mean that a buyer would only have to let the time pass by and could then bring proceedings in the courts whether there were undue hardship or not. That would be absurd, because s. 27 would never have any application at all. The remedy to the buyer, if he has one, is by application under s. 27 to extend the time for arbitration. I agree that the appeals should be allowed.

Appeals allowed. Stay ordered.

Solicitors: *Kimbers, Williams, Sweetland & Stinson; Stannard, Bosanquet & Michaelson.*

A. W. G.

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Mar. 12,
13, 14.

Lord Goddard, C.J., Asquith and Birkett, L.JJ.

Reversed. JOHN LEWIS & Co. *v.* TIMS [1952] A.C. 676

False Imprisonment—Arrest without warrant—Duty of person arresting to inform person arrested of reason for arrest—Duty of person arresting to take person arrested forthwith to a justice or police officer with power to grant bail.

Malicious Prosecution—Private prosecution—Prosecuting solicitors' view that no sufficient evidence against person charged—Request for remand to consult prosecutor—No malice.

The rule that, where a constable or a private person arrests without warrant, he must forthwith inform the person arrested of the true ground for his arrest requires only that he must do what a reasonable person would do to inform the person arrested of that for which he is being taken into custody.

Per Lord Goddard, C.J. If he is arresting a deaf person, he need not possess himself of an ear-trumpet, or, if he is arresting a foreigner who does not know English and whose language he himself does not know, he need not give him this information until he can procure an interpreter at the police station.

Where a constable or private person arrests without warrant, he must forthwith take the person arrested before a justice or, as the court now decided, to a police officer of superior rank, who has the power to grant bail to the person arrested. The law does not grant to the person who has arrested a reasonable time in which to make up his mind what he is going to do: he has to take the person arrested before a justice or a superior police officer as quickly as he reasonably can. Once the person has been arrested he must not be taken first (on the way to the justice or police officer) to the scene of the crime alleged or to the offices of the person alleged to have been deprived, defrauded or injured, for the purposes of then investigating the crime alleged or of consideration whether the person arrested shall be prosecuted.

Where a solicitor has been instructed to prosecute a person charged in the police court, he has no implied authority to ask the court whether he may abandon the prosecution. Accordingly, in a subsequent action for malicious prosecution against the prosecutor, it is no evidence of malice on the part of the solicitor that, having come to the conclusion that it was unlikely that he would secure a conviction against the person charged, he, in order that he might have time to inform the prosecutor of his opinion and to obtain directions from him, merely asked that the person charged should be remanded for a period and did not forthwith ask the court for leave to abandon the prosecution.

Per Lord Goddard, C.J. Had the application for a remand been evidence of malice on the part of the solicitor, it would not have been evidence of malice on the part of the prosecutor.

The fact that the solicitor comes to the conclusion that he would be unlikely to secure a conviction of the person charged is not in

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itself evidence of absence of reasonable and probable cause in the action for malicious prosecution, since "The distinction between "facts to establish actual guilt and those required to establish a "bona fide belief in guilt should never be lost sight of in con-"sidering" cases of alleged malicious prosecution. "Many facts "to prove the latter would be wholly inadmissible to prove the "former". (*Per* Hawkins, J., in *Hicks* v. *Faulkner* (1878) 8 Q. B. D. 167, 173.)

Per Lord Goddard, C.J. The question in an action for malicious prosecution whether there was an absence of reasonable cause for the prosecution has not to be determined subjectively: it is a question which the court has to determine objectively on the evidence before it; that is to say, the question is not what, on the evidence known to the prosecutor, he did in fact think, but what, as a reasonable person, he ought, in the view of the court, to have thought.

APPEAL from Donovan, J., sitting with a jury.

On December 16, 1948, the plaintiff, Mrs. Annie Elizabeth Tims, with her daughter, while in the shop of the defendants, John Lewis & Co. Ld., in Oxford Street, London, were under observation by two store detectives, when they saw the daughter take away without payment four calendars in the Christmas card department. She placed the calendars in a bag. The detectives then followed the plaintiff and her daughter into the shop of Littlewoods Stores Ld., where they saw the daughter pick up a tablecloth, examine it and, as they said, show it to her mother. Both mother and daughter subsequently denied that it had been shown to the mother. The daughter then took this tablecloth without paying for it and put it into the same bag as the calendars, which the mother was carrying. The two then left the shop. The plaintiff's account of what happened was: "As we "were coming out my daughter was in front, and there were two "women. One put her hands up so excitedly and said some-"thing. I did not catch everything. I could only say what I "caught, but it was something about calendars and handker-"chiefs, [and the words] 'You must come with me'". The plaintiff was hard of hearing. The daughter's evidence was that the detectives spoke to both mother and daughter and that they were quite close to each other. Mother and daughter were then taken across the road, one detective having her arm on the plaintiff all the time. The Lord Chief Justice said that it could not be challenged that both the plaintiff and her daughter had been arrested by the store detectives, who took them back to the defendants' premises. There they were detained and then seen by the managing director, who, having heard the statements made

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by the store detectives that the daughter had been seen to steal in both shops, and that the mother, the plaintiff, was in possession of recently stolen property, said that the defendants would prosecute them. Officers were sent for from Marylebone Lane Police Station to whom the plaintiff and her daughter were given in charge. They were taken to the police station, where they were charged, and at about 6 p.m. they were released on bail to appear at the Marylebone Police Court on the following morning.

The defendants instructed one Powell, a solicitor, to conduct the prosecution. When the case came before the magistrate, the solicitor felt some doubt whether there was sufficient evidence against the plaintiff for the case to be sent for trial or for it to be dealt with summarily. He therefore asked for a remand, since he had no authority from the defendants to withdraw the prosecution against the plaintiff. The charge against the mother and daughter, as it then stood, was joint, that they had both been concerned in the thefts. The defendants' solicitor asked for a remand for fourteen days. He said that he made that request with the consent of both the persons charged. The solicitor said that he had been informed by a detective that that was what they wanted. The detective denied that he had told the solicitor that. The defendants made no protest, and the magistrate granted the request. At the next hearing the solicitor, on behalf of the prosecution, asked the leave of the court to withdraw the prosecution of the plaintiff, and the magistrate assented.

The plaintiff brought an action against the defendants, claiming damages for slander, assault, false imprisonment and malicious prosecution. The case was tried before Donovan, J., and a jury, and the plaintiff recovered 15*l*. damages for false imprisonment, and 176*l*. 15*s*. for malicious prosecution, a sum for special damages common to both claims being included under the latter head. The plaintiff failed on the issues of slander and assault. The jury were asked a number of questions, one of them being: "Was the prosecution continued after the defen- "dants honestly believed the plaintiff to be not guilty?" To that question the jury answered: "Yes". Donovan, J., said: "I warned the jury not to give this answer and I shall disregard "their answer".

The defendants appealed.

Melford Stevenson, *K.C.*, *Roy Wilson*, *K.C.*, and *Adrian Hamilton* for the defendants. The plaintiff had to establish an absence of reasonable and probable cause for the prosecution on the claim for malicious prosecution, and the defendants that they had reasonable and probable cause for suspecting the plaintiff of theft or of the receiving of stolen property on the issue of false imprisonment. The issue of reasonable and probable cause was relevant to both claims. The plaintiff failed to prove an absence of reasonable and probable cause on the former claim and the defendants established that they had reasonable and probable cause to suspect the plaintiff on the latter.

As Hawkins, J., said in *Hicks* v. *Faulkner* (1) when delivering the judgment of the court (Huddleston, B., and Hawkins, J.) on an argument of rule for a new trial, in an action for malicious prosecution: "I should define reasonable and probable cause to "be an honest belief in the guilt of the accused based upon a full "conviction, founded upon reasonable grounds, of the existence "of a state of circumstances, which, assuming them to be true, "would reasonably lead any ordinarily prudent and cautious "man, placed in the position of the accuser, to the conclusion "that the person charged was probably guilty of the crime "imputed".

Lord Atkin, in *Herniman* v. *Smith* (2), said that he knew no better statement of this issue of reasonable and probable cause than this. Hawkins, J., said, further (3): "The question of "reasonable and probable cause depends in all cases, not upon the "actual existence, but upon the reasonable bona fide belief in "the existence of such a state of things as would amount to a "justification of the course pursued in making the accusation "complained of—no matter whether this belief arises out of the "recollection and memory of the accuser, or out of information "furnished to him by another. It is not essential in any case "that facts should be established proper and fit and admissible "as evidence to be submitted to the jury upon an issue as to the "actual guilt of the accused. The distinction between facts to "establish actual guilt and those required to establish a bona "fide belief in guilt should never be lost sight of in considering "such cases as that I am now discussing. Many facts admissible to prove the latter, would be wholly inadmissible to prove "the former".

Donovan, J., disregarded the answer of the jury that the prosecution was continued after the defendants honestly believed the plaintiff to be not guilty. The solicitor's authority from the defendants was to prosecute the plaintiff. He formed the view that it was unlikely that a conviction would be obtained, but he had no authority to invite the magistrate to let him offer no evidence against the plaintiff. By asking him for, and obtaining, a remand in the presence of the plaintiff, he took every step he could to secure that the prosecution was not pursued; and at the re-hearing it was not pursued. It is plain that (a) there was no malice on the part of the solicitor; (b) that, if there had been malice on his part, it would not have been malice on the part of the defendants; and (c) that there was no malice on the part of the defendants, who, on hearing what, it is submitted, was the mistaken view put forward by the solicitor that the evidence might not secure a conviction, dropped the prosecution. As to the absence of reasonable and probable cause, that issue, once the relevant facts are found by the jury, is for the judge: see *Herniman* v. *Smith* (4). The editors of Clerk and Lindsell on Torts (10th ed.), at p. 809, write: "If, however, a principal "controls a prosecution and simply employs a ministerial agent "to carry out the proceedings, the fact that the agent was "malicious or had reason to know the prosecution ill-founded "will not, it seems, affect his innocent principal: *Stevens* v. "*Midland Counties Railway* (5) and *Johnson* v. *Emerson* (6)"; see the judgments of Cleasby, B., and of Bramwell, B., in *Johnson* v. *Emerson* (7).

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(1) (1878) 8 Q. B. D. 167, 171.
(2) [1938] A. C. 305, 316.
(3) 8 Q. B. D. 173.

The trial judge appears to have fallen into error in two respects: (1.) in imputing the view of the solicitor to the defendants, when he asked for the remand, and (2.) in failing to distinguish between facts to establish actual guilt and those required to establish a bona fide belief in guilt on this issue of absence of reasonable and probable cause.

Colin Duncan and *Martin McLaren* for the plaintiff. The plaintiff was arrested by the two store detectives, and it appears on the evidence that she was not informed of the charge on which she was being arrested: see *Christie* v. *Leachinsky* (8).

[ASQUITH, L.J. You cannot expect the person arresting to do more than what is reasonable to inform the person arrested of that with which he or she is charged. The plaintiff was hard of hearing.]

I accept that proposition: the issue is not whether the plaintiff understood what was said to her, but whether proper and adequate attempts were made to inform her of that of which she was accused. It is submitted that this was not done.

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(4) [1938] A. C. 305.
(5) (1854) 10 Ex. 352, 356.
(6) (1871) L. R. 6 Ex. 329.
(7) Ibid. 333, 367.
(8) [1947] A. C. 573.

Again, the person arresting without warrant must take the person arrested forthwith to a justice or perhaps, in modern times, to a police officer, with the power to grant bail. He cannot take him to the scene of the crime alleged for the purpose of inquiry or to consider whether the charge shall be pursued. The plaintiff was taken to the defendants' store and there detained for a further period while their managing director considered the evidence and whether the company should prosecute the plaintiff; and then for a period while officers of the police were sent for and until they arrived. It is clear that for these periods the plaintiff was falsely imprisoned: see *Wright* v. *Court and Others* (9); *Hall* v. *Booth* (10); *Morris* v. *Wise* (11); and *Dunne* v. *Clinton* (12).

As to the claim for malicious prosecution, it lies on the plaintiff to prove (1.) absence of reasonable and probable cause, and also (2.) malice. On the first issue I do not need in this case to prove an absence of reasonable and probable cause for instituting proceedings at the outset; but as soon as the solicitor arrived at the conclusion that he had no, or but little, chance of securing a conviction, he should have applied for leave not to continue the case. From that moment, there was malicious prosecution, both absence of reasonable and probable cause and malice in law: see the judgment of Lord Atkin in *Meering* v. *Graham-White Aviation Co. Ld.* (13). When the prosecutor has reached a stage where he is satisfied that there is no longer a reasonable chance of conviction, his duty is then and there to ask for leave to abandon the prosecution. The defendants' solicitor was not obliged to ask for a remand for fourteen days. Addressing the magistrate, he could and should have said that he was satisfied that there was not sufficient evidence against the plaintiff. At that moment there was an end of any reasonable and probable cause for the prosecution.

In *Herniman* v. *Smith* (14) Lord Atkin said (15): "I need "only state that the inquiry" (as to the facts ascertained by the defendant at the time when he laid the information, on the issue of absence of reasonable cause) "is confined to the effect or the "reasonable effect of the evidence from time to time on Mr. "Smith's [the prosecutor's] mind".

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(9) (1825) 4 B. & C. 596.
(10) (1834) 3 N. & M. 316.
(11) (1860) 2 F. & F. 51.
(12) [1930] I. R. 366, 372, 374.
(13) (1919) 122 L. T. 44, 56.
(14) [1938] A. C. 305.
(15) Ibid. 315.

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[ASQUITH, L.J. On the issue of absence of reasonable cause there is an objective element. If there is a subjective element, that can be said to overlap the issue of malice. See the observations of Lord Greene, M.R., in *Herniman* v. *Smith* (16) in the Court of Appeal. According to the Master of the Rolls, the issue is not what the prosecutor thought, but what he ought to have thought.]

The words of Lord Atkin referred to are admittedly capable of that meaning, and perhaps that meaning is supported when he said in *Herniman* v. *Smith* (17): "When the judge knows the "facts operating on the prosecutor's mind, he must then decide "whether they afford reasonable or probable cause for prose-"cuting the accused".

If the plaintiff has succeeded in showing that there was an absence of reasonable and probable cause for continuing the prosecution when the solicitor asked for a remand, that absence of reasonable and probable cause may itself be evidence of malice: *Brown* v. *Hawkes* (18).

[ASQUITH, L.J. The solicitor had no authority to ask that he might abandon the prosecution.]

Where the prosecutor knows that the accused person is innocent, there is, of course, clear evidence of malice, and the fact that he was bound on his own recognizances to prosecute will be no answer to an action: *Fitzjohn* v. *Mackinder* (19). If a prosecutor employs an agent to prosecute and the agent is guilty of malice, that malice is imputed to the principal: see Halsbury's Laws of England (2nd ed.), vol. 22, p. 7, para. 7, and the cases there cited. The prosecutors were the defendants, and their solicitor was a mere conduit pipe for the prosecution. I concede that if the solicitor was not guilty of malice, there was no malice on the part of the defendants.

Melford Stevenson, K.C. (called on to reply only on the contention that the defendants were guilty of false imprisonment by their detectives' taking the plaintiff back to their premises and keeping her there until she was handed over to the police officers, instead of taking her directly to the police station). According to the authorities on arrest without warrant, the prisoner has to be taken before a justice—now, no doubt, a police officer with power to grant bail will suffice—"with *reasonable* expedition" and "as soon as he *reasonably* can": *Wright* v. *Court* (20);

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(16) [1936] 2 All E. R. 1377, 1386.
(17) [1938] A. C. 305, 317.
(18) [1891] 2 Q. B. 718, 723.
(19) (1861) 9 C. B. (N.S.) 505.
(20) 4 B. & C. 596.

Hall v. *Booth* (21); and *Morris* v. *Wise* (22). In a word, the arrester must act reasonably. In modern conditions it is reasonable, where the arrester is a detective employed by large stores, to take the prisoner, on the way to the police station, to the offices of the store, where the question of prosecution can be considered. It may well be of great benefit to the person arrested, and is essentially reasonable; and the person arrested, if the prosecution is to proceed, will reach the police station before the time in which, in earlier days, he would have reached a justice.

Lord Goddard, C.J. [after stating the facts]: Mr. Duncan has contended that this case is completely covered by the decision of the House of Lords in *Christie* v. *Leachinsky* (23). That case decided that if a person, be he a police officer, that is to say a constable, or a private person, arrests without warrant, he must tell the person whom he is arresting that for which he is being arrested. If the constable has no warrant, it is not enough for him to say "you must come along with me. I am going to "take you into custody": he must tell the person whom, without warrant, he arrests for what he is being taken into custody. And their Lordships in that case held that that had been the law certainly ever since the days of Hale, and they laid it down in these terms (24): "If a policeman arrests without warrant upon "reasonable suspicion of felony, or of other crime of a sort "which does not require a warrant, he must in ordinary circum-"stances inform the person arrested of the true ground of arrest. "He is not entitled to keep the reason to himself or to give a "reason which is not the true reason. In other words a citizen "is entitled to know on what charge, or on suspicion of what "crime, he is seized".

Can there be any doubt in this case that the plaintiff did know on what ground she was being taken into custody? Her whole case in the claim for slander was that one of the detectives had said: "You have taken calendars and handkerchiefs from John "Lewis's. You must come with me". So far as I can see, the only ground she has for saying that she did not know for what she was being arrested was that she was rather hard of hearing, that she did not hear all of what the detective said, and has found out afterwards that that is what she did say. Assuming that that is so, I do not think that the decision of the House of Lords means that if an officer is arresting a deaf person, he has to possess himself of an ear-trumpet, or something of that sort, or shout at the top of his voice. He must do what a reasonable person would do in the circumstances. As I said during the course of the argument, if a police officer who is not able to speak French has to arrest a Frenchman who does not speak English, he can only tell him in English for what he is arresting him, and take him to the police station until some officer who does speak the language or some interpreter comes to explain the charge on which he has been arrested to the person arrested. In stating the charge or on suspicion of what crime a person is arrested, the person arresting without warrant has only to act reasonably. If you arrest without a warrant, you arrest, as it has often been said, at your peril, and the requirement laid down in *Christie* v. *Leachinsky* (23) is to prevent what happened in *Walters* v. *W. H. Smith & Son Ld.* (25). In that case a man was arrested for one felony and then it was found that that arrest was unjustifiable, but the prosecutors sought to say: "Yes, but in fact "there was another felony for which you might have been "arrested". The decision in *Christie* v. *Leachinsky* (23) requires a person arresting without warrant to inform the person he is arresting of the charge on which he is arrested, because it might be that if he was arrested for crime A without a warrant and it turns out that crime A has not been committed, the person arresting might say: "I have found out that your arrest was "justified in connexion with crime B".

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(21) 3 N. & M. 316.
(22) 2 F. & F. 51.
(23) [1947] A. C. 573.
(24) Ibid. 587.

In my opinion this plaintiff cannot be in the position of saying that she did not know for what she was being arrested. The daughter's evidence was that the detective spoke to both of them and that they were quite close to each other. The plaintiff herself says that she heard enough to know that a charge was being put forward; and she heard the detective say to her: "You "have taken calendars and handkerchiefs from John Lewis's. "You must come with me". That is what she was being arrested for, and in my opinion there is no ground, in view of the decision in *Christie* v. *Leachinsky* (23), for saying that the arrest was unlawful.

But now comes another point of considerably more interest, and one on which I think the plaintiff is entitled to uphold the judgment for false imprisonment. She was, after her arrest, taken to the stores of John Lewis & Co. Ld., and she was taken there in order that the store detectives might obtain authority from the company's managing director to hand her over to the police for the purpose of a prosecution for theft. In my opinion the law is well settled on this point, and we cannot give effect to a plea that it is necessary in these days of large stores to take a different view of the law from that which has been consistently applied, so far as I can see, by the courts for considerably more than a hundred years.

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(25) [1914] 1 K. B. 595.

The law, as I understand it, is this, that if a person, be he a constable or a private person, arrests without warrant—and I emphasize those words because if there is a warrant it makes all the difference—although the arrest may be perfectly justified on the ground that a felony has been committed and that there is reasonable and probable cause for believing that the person arrested has committed the offence, it is the duty of the constable or the private person forthwith to take the arrested person before a justice—that was the original law—but now, I think, to a police station, before a police officer. I say that because, since the Summary Jurisdiction Act, 1879 (see s. 38), as amended and extended by other Acts (26), a superintendent or inspector of police, or other officer of police of equal or superior rank, has power, where a person is brought to the police station having been arrested without a warrant, to grant bail. Obviously, the reason why the common law required that a person should be forthwith taken before a justice was because he was being imprisoned, in the sense that his liberty was being curtailed; he had been taken into custody, and it was therefore for a justice at once to consider whether or not the case should be investigated there and then, as might have been done in the old days when he sat in his own justice room, and was constantly done, or whether he should grant bail. And now that a police officer has statutory powers to grant bail, he will do so, except in cases of gravity or where for good reason he may think it would be unsafe to grant bail. In an ordinary case of a crime of this sort a police officer is as efficacious, for the protection of the subject, as a justice, and for that reason the arrested person should be taken forthwith before a police officer.

I have said that the law in my opinion has been laid down in the clearest terms, and we are not entitled to depart from it.

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(26) See now s. 22 of the Criminal Justice Administration Act, 1914.

The first case which I desire to cite on this point is *Hall* v. *Booth* (27). That was a case of false imprisonment, which, of course is trespass to the person. The plaintiff there alleged that he had been kept and detained and falsely compelled to go to a police station house. This was in 1834, before the Summary Jurisdiction Act, 1879, had been passed, and when there was no power in a police officer to grant bail. Among other things, it was alleged that the plaintiff in that case had stolen or was suspected of stealing a gun, and the plea of justification, which is set out in full, was this: "The defendant having reasonable "and probable cause for suspecting and actually suspecting, the "plaintiff to have been guilty of and concerned in the felonious "stealing, taking, and carrying away of the said gun, did at the "time when and in the declaration mentioned, with the "assistance of a certain policeman, jointly lay hands on the said "plaintiff, and assaulted him the plaintiff, and seized and laid "hold of him, in order to carry and convey, and did carry and "convey him the plaintiff to the said pawnbroker's shop in the "declaration mentioned, for the purpose of ascertaining if the "plaintiff was the person who had pawned the gun as aforesaid, "and there kept and detained the plaintiff for a reasonable time "in that behalf, as it was lawful for the defendant to do". That plea was overruled by the court. Mr. Cresswell, for the defendant, put forward the proposition: "A party may take another "to the place where the theft was committed in order to "inquire"; but Denman, C.J., said: "You may go to inquire, "but you cannot take him".

How does that case differ from this? Here the plaintiff and her daughter were taken to the stores of John Lewis & Co. Ld. for the purpose of the detectives inquiring whether Commander Newdegate proposed to prosecute or not, and that is the very act which Denman, C.J., said they could not do. And that was a court which sat in the days of Patteson, J., Littledale, J., and Williams, J., which used to be called, I think, the golden era of the King's Bench. And in that case is stated expressly the view of Denman, C.J., that the defendant and the policeman could not take the plaintiff to the place where the theft had been committed, for the purpose of inquiry.

In *Wright* v. *Court and Others* (28) Bayley, J., Littledale, J., and Holroyd, J.—a strong court, were sitting in banc. The marginal note to that case is: "A constable arresting a man on

(27) 3 N. & M. 316.

(28) 4 B. & C. 596.

"suspicion of felony must take him before a justice to be "examined as soon as he reasonably can. Therefore a plea "justifying a detention for three days, in order that the party "whose goods had been stolen might have an opportunity of "collecting his witnesses and bringing them to prove the felony, "was held bad on demurrer". It does not matter, of course, whether the detention was for three days or for three hours, because what the court said was: "The plaintiff alleges that he "was imprisoned for three days, and the first special plea admits "that he was imprisoned for that space of time before he was "taken to the magistrate for examination, and avers that it was "a reasonable time for that purpose, and for enabling Clarke to "collect and bring his witnesses to prove the felony. But it is "the duty of a person arresting anyone on suspicion of felony "to take him before a justice as soon as he reasonably can, and "the law gives no authority even to a justice to detain a person "suspected, but for a reasonable time till he may be examined. "The justice might have been justified in ordering this plaintiff "to be detained until Clarke could bring his witnesses, but it is "clear that the defendants had no authority to detain him "without such order".

Then there is *Morris* v. *Wise* (29), which, it is true, was only a decision at nisi prius, before Byles, J. It is unnecessary to state all the facts, but the defendant arrested the plaintiff for an offence in connexion with the cutting and carrying away of some grass, and, instead of taking him direct to a justice or to the police office, he took him some distance in another direction to the place where the grass was alleged to have been cut, in other words to the scene of the theft, as the defendants' shop was here. It was held that there was a trespass which could not be justified. Although the damages there were very small, being 40*s*. nominal damages, the trespass could not be justified, because, as I have said, these cases clearly show that at common law, if a person arrests another without a warrant he arrests at his peril, which means that he has strictly to comply with the law, and that he must take the person arrested to a justice or, as I think, we can now properly decide, before a police officer who has power to grant bail.

I think, therefore, that although for reasons with which I shall deal when I come to the case for malicious prosecution, the arrest outside the shop of Littlewood's Stores Ld. was a perfectly justifiable arrest, and could have been justified, I am of the opinion that the taking of these two women to the stores of John Lewis & Co. Ld., instead of taking them direct to a metropolitan police station or to a metropolitan police court could not be justified and that therefore, technically, there was a false imprisonment of the plaintiff.

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(29) 2 F. & F. 51.

We were told that this case is of enormous importance to stores who employ private detectives. So it may be; but it is just as well that they should know what the law is, if they did not know it before. If they employ private detectives, it is their business to instruct them in the law; and if the private detectives are given power to arrest they must do what the law requires, and that is to take the persons arrested before a justice or a police officer, and not to take them back for the purpose of investigation. As I pointed out in the course of this case, if an innocent person is taken back and on investigation it is found that he is innocent, because he has paid for the goods and the detectives have made a mistake, that person is entitled, of course, to be compensated for having been arrested, because that is false imprisonment. But I have no doubt that in this case the detaining of the plaintiff at the defendants' shop, which is the false imprisonment alleged here, for an hour, was unjustified. The law does not permit the person arresting without warrant to do that: the detectives here should have taken the person arrested before a justice or a police officer. Unfortunately this view was not taken by the trial judge. He took the view that all he had to consider was whether the detectives of the defendants acted reasonably. I do not think that that is right. The construction to be put on those words, that he is to take the person arrested before a justice as soon as he reasonably can, does not give to the person who has arrested another a reasonable time in which to make up his mind what he is going to do. He has to take the person arrested before a justice or a police officer as quickly as he reasonably can. If you arrest a man in the middle of the night, you cannot take him before a justice, and, perhaps, not to a police officer, until the day-time. On the other hand, if you arrest him during the morning, you must take him before a justice as quickly as you can. If it is in a town, a court may be sitting, or at any rate there will be a police officer available. All those matters are to be taken into account. But there is no warrant in the books for saying that instead of taking the man to the justice or the police station you can take him to the place where the theft has been committed for the purpose of investigation and inquiry. Whether it is desirable that the law should be that, or whether it is desirable that in these days it should be changed, is neither here nor there. The law is clear and it is not for us to change it. The plaintiff was, therefore, entitled to succeed on the issue of false imprisonment. As to the damages, the defendants do not ask for a new trial and in view of the findings of the jury the damages should be assessed at 30*l*.

With regard to malicious prosecution, we have heard a very long argument on the claim under that head, but it does seem to me that the case is reasonably clear. In view of what the detectives say and in view of the facts, it cannot be seriously contended that there was no reasonable or probable cause for instituting the proceedings and prosecuting, and no one has really suggested there was not. But we have listened to an interesting argument, strongly pressed by Mr. Duncan, in which, as I understand it, he contended, first of all—and I think very likely he is right on this point—that, although you may have reasonable or probable cause for bringing a prosecution, you may receive information or discover facts while the prosecution is pending, or is continuing, which show that you in fact have no reasonable or probable cause for continuing the prosecution. It is quite easy to imagine a case in which a person was thoroughly justified in bringing proceedings, and then in the course of the case something comes to light which shows the prosecution to be in fact groundless. Then if the prosecutor insists on continuing the prosecution without at any rate informing the court of the facts which he has since discovered, he will, I think, possibly have no reasonable or probable cause for continuing the prosecution and at any rate will be guilty of malice. But, of course, in an action for malicious prosecution, it is necessary that the plaintiff should prove that the defendant was guilty of malice and that there was absence of reasonable or probable cause.

The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively, as has been suggested. It is a question which objectively the court has to decide on the evidence before it. As I say, it was not contended here that there was no reasonable or probable cause for bringing these proceedings in the first place. The defendants' detectives knew all the facts, which they had communicated to the solicitor. The solicitor had got it into his mind that, as he could not show any particular act by the plaintiff, and as he could only show that she was carrying the stolen property which had been seen to be put into her bag, it was unlikely that the magistrate or a jury would convict. Thereupon, he asked for a remand, in order to take his clients' instructions. He could not communicate with the defendants on the very day on which the case was before the magistrate. Therefore he obtained a remand and put the matter to his principals, who consented then to the case being withdrawn.

So far as malice is concerned, as I have already said, how that can be any evidence of malice in the solicitor I do not know. And if there was no malice in him obviously there was no malice in the defendants. It is sought here to say that the defendants, if their solicitor was guilty of malice, would be inspired or infected by that malice. I do not think that is right. The prosecutors in the case were the defendants. They had instructed the solicitor merely as their prosecutor, to prosecute, no doubt to prefer the charge, and to conduct the case before the magistrate; and even if the solicitor had been guilty of some malice in himself, I fail to see how the defendants would have been guilty of malice unless they proceeded to order him to continue the prosecution after they had been infected by what would constitute malice in him. But they did nothing of the sort: as soon as he had been able to communicate with them, they adopted his advice.

It is therefore quite impossible to say in this case that the solicitor was guilty of any malice; and it was conceded by Mr. Duncan frankly that if the solicitor was not guilty of malice there was no malice in the defendants.

The question left to the jury on the facts suggesting malice in the solicitor, in my opinion ought never to have been left to them. There was no evidence against him of malice. There was evidence that he had acted with what, as I have said, would appear to me to be undue consideration towards the plaintiff. Instead of presenting the facts that this woman came out of the shop, was found to be carrying stolen property, was obviously with her daughter, and that they were together the whole time, and letting the magistrate decide what inference was to be drawn from them, he took it upon himself to advise his clients to withdraw the case against the plaintiff.

Whether or not he did say mistakenly that the women consented to a remand, makes no difference. It cannot be said that anybody would get up and deliberately tell the magistrate such an untruth when the people charged were in court and it was said in open court and in their presence. It was a remand that it was unlikely that the magistrate would have granted, unless both parties had consented to it. The proper finding, in my view, is that there was no evidence of malice in the solicitor, and obviously the case for malicious prosecution fails.

We have listened to a long and interesting discussion upon reasonable or probable cause, but I can see no ground here for saying that the mere fact that the solicitor came to the conclusion that it would be unlikely that he would get a conviction is any evidence whatever of lack of reasonable or probable cause.

In fact, it would be going directly contrary to these words of Hawkins, J., in an oft-quoted judgment in *Hicks* v. *Faulkner* (30): " The distinction between facts to establish actual guilt and those " required to establish a bona fide belief in guilt should never be " lost sight of in considering such cases as that I am now dis- " cussing " (one of alleged malicious prosecution). " Many facts " admissible to prove the latter would be wholly inadmissible to " prove the former ".

I would refer very briefly to a passage in *Meering* v. *Graham-White Aviation Co. Ld.* (31) in the judgment of Lord Atkin. I think it is clear, when reading the very long judgment in full, that it is no authority for Mr. Duncan's contention. I think that what the Lord Justice was saying there was that if a person embarks upon a prosecution having no evidence that he can bring before a jury, or knowing that he has such slight evidence that no jury would convict, then that may be evidence that he had no reasonable or probable cause, and in fact would be strong evidence that he had not. I may suspect that my servant has been robbing me, but, if I have no evidence that he has been doing so, I have no reasonable or probable cause for prosecuting him. Once I get some evidence, if I have a bona fide belief in his guilt and have something to support my belief, then I may have a reasonable and probable cause. I do not know that I need go at any length into the other cases cited. For the reasons already given, it is quite plain that the claim for malicious prosecution fails, and to that extent the judgment, on that ground, must be set aside.

ASQUITH, L.J. I entirely agree that on the issue of malicious prosecution the plaintiff is not entitled to succeed, on the short ground that there is not a particle of evidence of malice on the part of the defendant company or anybody acting for it. The only person to whom it is sought to attribute malice is the solicitor who conducted the proceedings in the police court. The suggestion that his application for a remand, after he had ceased to believe the prosecution was likely to be successful, amounts to malice, seems to me fantastic. He was simply getting the proceedings suspended for the express purpose of giving himself an opportunity or breathing space to obtain authority from his principals to drop the prosecution, an act he had no authority to take without special instructions. This course does not seem to me to indicate malice. On the contrary, it seems to me to indicate a single-mindedness that justice should prevail.

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(30) 8 Q. B. D. 167, 173.

(31) 122 L. T. 44, 56.

As regards the issue of false imprisonment, there, again, I respectfully agree with my Lord that the plaintiff is entitled to hold her verdict on the narrow ground my Lord has explained, and I agree there should be no re-trial to ascertain damages.

BIRKETT, L.J. I agree. The questions that have been debated in the course of this case are, I think, of the very greatest importance, affecting as they do the liberty of the subject and also the important question of the respect which ought to be paid to the decisions of juries. The two questions which finally emerged for our decision, as has already been said, are those of false imprisonment and malicious prosecution. The judge in the court below decided the matter in favour of the plaintiff on the cause of action for false imprisonment solely on the ground that she had not been informed at the time that she was arrested of what was the reason for it. For my own part, I find it difficult to understand how that decision was reached.

The two questions which were put to the jury on that matter were, firstly: "Did [the detective] tell the plaintiff why she was "taking her to John Lewis's?" and the answer was "No". The detective always said: "I never did". The second question was: "Did the plaintiff know from what [a detective] had said "to [her daughter] that she, the plaintiff, was being taken to "John Lewis's on an accusation of the theft of calendars?" and the answer was: "No". As my Lord has already stated, the plaintiff herself quoted the very words which were employed by Miss Wheeler on that occasion. On the narrow ground upon which my Lord has disposed of the matter of false imprisonment, I agree with both his reasoning and his conclusion.

With regard to the cause of action for malicious prosecution, it is enough for me to say that I agree entirely with the view taken, that there was no evidence here at all, in my view, of malice on the part of the defendants' solicitor. I said once or twice in the course of the argument that it seemed to me that so far from the acts of the solicitor indicating malice, they

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showed the very contrary; and I think that there was no evidence properly to be left to the jury upon that issue at all.

I may just add this: when a jury come to a conclusion on a matter of fact on which they have been carefully directed, the courts, of course, pay the very greatest possible respect to their findings. But it happens in this case that to perhaps the most vital question of all that was put to them by the judge, the question, "was the prosecution continued after the defendants "honestly believed the plaintiff to be not guilty?", the answer was "Yes". The judge himself said: "I warned them not to, "and I shall disregard their answer altogether". On the matter of malice, I think that there was no evidence whatever to be left to the jury.

With regard to the whole case, I agree with the reasoning of my Lord and with what Asquith, L.J., has said, and I agree with their conclusion.

Judgment for the plaintiff in the claim for malicious prosecution set aside. Judgment for the plaintiff in the claim for false imprisonment upheld. Damages 30*l.*

Solicitors: *Underwood & Co.; Philip Conway, Thomas & Co.*

C. G. M.

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WILLIAM CORY & SON LD. *v.* LONDON CORPORATION.

Contract—Local government—Contract for removal of local authority's refuse by barges of prescribed type—Contractors to observe by-laws of authority subject to contract—New by-laws requiring barges of different type—Whether repudiation of contract—Contract alleged rendered commercially impracticable—Claim to rescission—Public Health (London) Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 50), *ss.* 1, 5, 84, *sub-s.* 1 (*a*).

London Corporation, acting as sanitary authority under the Public Health (London) Act, 1936, made a contract with the claimants, barge and lighter owners, for the removal of refuse from a wharf in the City to Hornchurch, Essex, where it was to be dumped.

The provisions of the contract as to coamings and coverings, etc., of the barges to be used were more onerous than those imposed by the then current and relevant by-laws, made in 1897.

In April, 1948, the corporation acting as port health authority for the Port of London, sealed by-laws concerning the disposal of refuse in the area of the port, one of which, relating to coamings and coverings of barges, was far more onerous on the claimants than the requirements in the contract of 1936. It was provided that this by-law was not to come into effect until November 1, 1950. On September 21, 1948, the claimants wrote to the corporation that as from that date the corporation, by sealing this by-law, had repudiated the contract by anticipatory breach of it, that they accepted the repudiation, and that they claimed rescission.

It was contended by the claimants that, by the provisions of the contract of 1936, there was an implied or an express term that the corporation should not impose more onerous burdens on the claimants as to the coamings and coverings of their barges than those contained in the contract of 1936, or that, if they did impose such terms, the contract should no longer subsist and would thus lead to a shortening of the contract.

It was not disputed by the corporation that the passing of the relevant by-law was a factor which made the contract commercially impossible of performance as from November 1, 1950, and one by which the contract was frustrated as from that date:—

Held, that, the corporation being under a duty under the Act of 1936, expressed in imperative language, to make by-laws for the disposal of refuse within the area of the port, the term for which the claimants contended, whether express or implied, was ultra vires the corporation. It followed that there could be no breach of it or repudiation of the contract through anticipatory breach.

York Corporation v. *Henry Leetham & Sons Ld.* [1924] 1 Ch. 557 followed.

Decision of Lord Goddard, C.J., [1951] 1 K. B. 8, affirmed.

Appeal from a judgment of Lord Goddard, C.J., given on an award in the form of a special case stated by an arbitrator.

The respondents, London Corporation, as sanitary authority for the purposes of the Public Health (London) Act, 1936, and, as such, the authority charged with responsibility for the removal of refuse from premises within the City, entered into a contract with the claimant company, William Cory & Son Ld., dated December 17, 1936, by which the latter, well-known barge and lighter owners, agreed to remove refuse from Lett's Wharf and to carry it in barges or lighters down the river to Hornchurch, where it was to be dumped.

By cl. 1, the claimants "shall at all times during the "continuance of this agreement provide at Lett's Wharf . . . "such a number of staunch and strong lighters and barges which "shall for the purpose of this agreement be fitted and maintained "with temporary coamings and coverings to be secured to the "permanent coamings as will be sufficient to remove the "materials aforesaid from Lett's Wharf aforesaid and in particular they shall at all times have so many lighters and barges "moored alongside Lett's Wharf aforesaid as will in the opinion "of the Director of Public Cleansing be sufficient for the reception "of the materials aforesaid as the same are brought or conveyed "to Lett's Wharf aforesaid and are required by the Director of "Public Cleansing to be removed therefrom. Each lighter and "barge shall be supplied by the contractors with sufficient hands, "tools and tackle".

By cl. 13, "Subject to the provisions of cl. 1 hereof, the "contractors shall at all times observe and comply with the "by-laws of the port health authority of the Port of London "for (a) the prevention of nuisances arising from refuse loaded "into lighters or barges, (b) the efficient cleansing of lighters or "barges after discharge of loads and (c) the prescribed times "during which loaded lighters or barges may remain in the district of the said port health authority. The contractors shall "also at all times observe and comply with the provisions of all "Acts of Parliament, by-laws, rules, regulations, and orders of "the Minister of Health, Board of Trade, Essex County Council, "the Port of London Authority, river police and/or any public "authority relating to the transport, dumping and/or disposal of "refuse, traffic and/or offences on the River Thames and/or any "matter or things arising out of this agreement".

The corporation by s. 5 of the Act of 1936 were the port health authority of the Port of London and, as such, charged with responsibility for making by-laws in relation, inter alia, to the disposal of refuse within the larger area of the port.

Before April 29, 1948, the claimants were losing about 7,000*l.* a year on the contract. On that date the corporation as port health authority, on the advice of the medical officer of health of the port, sealed new by-laws which were confirmed on July 16, 1948, by the Minister of Health. By No. 2 of these by-laws any vessel for removing refuse from the Port of London must be provided with permanent coamings and close fitting hatches capable of completely covering the refuse. This by-law was to take effect on November 1, 1950.

When the contract of December 17, 1936, was made the only relevant by-laws were those of 1897, the requirements of which were less stringent in this regard than those imposed by cl. 1 of the contract. The requirements of the by-laws of 1948 were very much more stringent than those imposed by cl. 1 and, a fortiori, than those imposed by the by-laws of 1897. A compliance with by-law No. 2 of the by-laws of 1948 by the claimants would have been prohibitively onerous: they would have had to spend 400*l*. or 500*l*. on every barge and they could no longer have used the barges, which went to Hornchurch down river, to return up river with cargoes of coal as theretofore. In the ordinary course, the contract would have run on for twenty-one years from 1948 until 1969.

On September 21, 1948, the claimants wrote a letter to the corporation purporting to treat the act of the latter in sealing the 1948 by-laws as an anticipatory repudiation of the contract of 1936, accepting that repudiation and claiming rescission. The claimants then by arbitration under a clause in the contract claimed a declaration that as from September 21, 1948, they were no longer bound by the contract.

The question of law arising on the award in the form of a special case was: did the act of the corporation, in their capacity as port health authority, in sealing and procuring the confirmation of the by-laws of 1948 amount to a repudiation of the agreement of 1936, " so as to entitle the claimants, in law (notwithstanding " that by-law No. 2 was not to come into operation until " November 1, 1950), to treat the agreement as determined on " September 21, 1948 "? It was not disputed by the corporation that if the act of the corporation did not constitute a breach or a repudiation, it was, at the lowest, a factor which made the contract commercially impossible of performance after November 1, 1950, and by which the contract was frustrated as from that date.

Lord Goddard, C.J. (1), answered the question of law in the negative in favour of the corporation, and the claimants appealed.

Sir Walter Monckton, K.C., and *C. P. Harvey, K.C.*, for the claimants. There was here by reason of an anticipatory breach of the contract of December 17, 1936, a repudiation of the contract as from the confirmation of the new by-laws on July 16, 1948. The claimants accepted that repudiation on September 21, 1948, and they are right in claiming rescission from that date. As Lord Esher, M.R., said in *Budgett & Co.* v. *Binnington & Co.* (2): " Speaking generally of all contracts a breach is excused, " where the party committing the breach has been prevented by

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(1) [1951] 1 K. B. 8.

(2) [1891] 1 Q. B. 35, 38.

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"the other side from carrying out his contract". See also The Restatement of the Law (U.S.A.) Contracts, vol. 1, s. 315. The claimants were entitled to rescind the contract: see the judgments of Lord Esher, M.R., and of Bowen, L.J., in *Johnstone* v. *Millinge* (3).

It was not disputed by the corporation that, if their actions in sealing the by-laws and obtaining the confirmation of them by the Minister of Health did not constitute a breach or a repudiation, they were a factor which made the contract commercially impossible of performance after November 1, 1950. That means, in effect, that the contract of December 17, 1936, had been repudiated. As Lord Parker said in *F. A. Tamplin Steamship Co. Ld.* v. *Anglo-Mexican Petroleum Products Co. Ld.* (4) (a passage cited by Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.* (5)): "It was easy to imply a condition that, "if the voyage became impossible of completion, within that "season, the contract should be at an end". There is a termination of the obligation. Frustration is compared by Lord Sumner with repudiation plus rescission in *Hirji's* case (6). There is in any contract an implied term that a party shall not prevent performance by another party by any wrongful act or breach of contract. See also *Board of Trade* v. *Temperley Steam Shipping Co. Ld.* (7).

[Harman, J. Do you agree that the corporation were under a duty to make the relevant by-law of 1948?]

No: there was a duty and power to make by-laws, but no duty to make by-law No. 2 of 1948—the relevant by-law: see s. 84, sub-s. 1 (*a*), of the Public Health (London) Act, 1936. There were by-laws relevant to this matter in 1936, and the Act of 1936 does not impose on the corporation a duty to enact any particular by-law in any particular terms.

The corporation here have made a contract that they would not impose on the claimants a higher obligation in respect of their coamings and coverings than that imposed on them by cl. 1 of their contract, or, rather, that if they did they would not require the claimants to carry out the contract. The implied term was that the corporation would do nothing to prevent the fulfilment of the contract. [*New Zealand Shipping Co. Ld.* v. *Société Des Ateliers et Chantiers De France* (8); *Freeth* v.

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(3) (1886) 16 Q. B. D. 460, 467, 472.

(4) [1916] 2 A. C. 397, 424.

(5) [1926] A. C. 497, 506.

(6) Ibid. 509–10.

(7) (1926) 26 Ll. L. Rep. 76, 78; (1927) 27 Ll. L. Rep. 230, 231.

(8) [1919] A. C. 1.

Burr (9) and *Maple Flock Co. Ld.* v. *Furniture Products (Wembley) Ld.* (10), were referred to.]

Harold Williams, K.C., and *Wilfrid Hunt* for the corporation. There was a duty on the corporation to make by-laws, among other things, in relation to the disposal of refuse within the area of the port: see s. 84, sub-s. 1 (*a*), of the Public Health (London) Act, 1936. On the advice of the medical officer of health of the port, they sealed these new by-laws in 1948, with which in November, 1950, the claimants would be bound to comply. The corporation have always agreed that the new by-laws made the contract commercially impossible of performance on or after that date, and that the contract was then frustrated. But the sealing of the by-laws was not a repudiation of the contract as from September, 1948.

By cl. 13 of the contract the claimants had affirmed their duty to obey the by-laws made from time to time. There is no such conception in law as that of an anticipated frustration.

The implied term suggested by the claimants is that the corporation will not exercise their statutory powers to make by-laws under the Public Health (London) Act, 1936. Such a term, if expressed, it is clear, would be illegal, invalid and beyond the powers of the corporation and contrary to public policy. Breach of an invalid term of a contract, whether implied or express, cannot give a right to rescind a contract, since, at the outset, there has been no breach. The suggested implied term of this contract is that the corporation will not exercise their powers beyond a certain limit. The corporation could not and have not fettered themselves in this way: see *York Corporation* v. *Henry Leetham & Sons Ld.* (11).

It has been suggested that the implied term here is also an express term by reason of the first words of cl. 13 of the contract: " Subject to the provisions of cl. 1 hereof " and that what is meant is that by-laws in terms more stringent than those imposed by cl. 1 of the contract shall not be imposed. If that were the meaning of these words, the same objection would apply. It is ultra vires the corporation to fetter their powers and their duty in this way. But this is not the meaning of cl. 13. The words " subject to " are not to be read as " rising to, but not " exceeding ", the terms of cl. 1 of the contract. What is meant is that, in all events, the terms of cl. 1 must be complied with, and in addition all by-laws, whether the earlier ones of 1897

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(9) (1874) L. R. 9 C. P. 208, 214.
(10) [1934] 1 K. B. 148.
(11) [1924] 1 Ch. 557.

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or any later by-laws which may be sealed. In effect the words "Subject to the provisions of cl. 1 hereof" mean "without "prejudice to the obligations of the contractors under that "clause". At the outset, the claimants must found their case on some breach of contract and here there was none.

By repudiation by way of anticipatory breach is meant the act of one party to a contract in expressing and communicating to the other party *before the date of performance*, his intention not to perform the contract, when that date arrives. But there appears to be no case in the books where an anticipatory breach and repudiation of contract have been upheld while the contract is being performed.

As to the function of a by-law, see the observations of Lord Russell of Killowen, C.J., in *Kruse* v. *Johnson* (12).

Sir Walter Monckton, K.C., in reply. The term to be implied in this contract is that the corporation will not seek to hold the claimants to it while imposing an obligation by by-law more stringent than that imposed under cl. 1 of the contract of December 17, 1936. The corporation have admitted breach of this term, since they agree that they cannot hold the claimants to this contract after the date when the new by-law No. 2 of the by-laws of 1948 comes into force. In effect, the provision was: "You cannot put obligations on me more onerous than that contained in cl. 1 and hold me to this bargain". It cannot, perhaps, be contended that the contract means that the terms of the by-laws shall not be more onerous than those contained in cl. 1 of the contract; but it can be contended that, if they prove to be more onerous, then the contract shall not still subsist. On that basis, the decision in *York Corporation* v. *Henry Leetham & Sons Ld.* (13) does not affect the point being made. And in any case the decision in the *York* case (13) was severely criticized by the Court of Appeal in *Southport Corporation* v. *Birkdale District Electric Supply Co. Ld.* (14), and the *York* case (13) was considered in the *Southport* case (15) when it reached the House of Lords (15).

In the contract of December 17, 1936, cll. 1 and 13 should be construed as constituting a "ceiling" beyond which, whilst this contract subsists, the provision as to coamings and coverings, etc., shall not go. The duration of the contract is a substantial and essential feature of it, and to seek to impose on the claimants a higher obligation than is expressed in cl. 1 and to hold the claimants

(12) [1898] 2 Q. B. 91, 96.

(13) [1924] 1 Ch. 557.

(14) [1925] Ch. 794.

(15) [1926] A. C. 355.

to their contract, is to tear it up by the roots. In effect, the corporation have admittedly shortened the term of the contract. In September, 1948, therefore, the claimants were entitled to rescind this contract on the ground that it had been repudiated by making the contract, as the corporation admit, commercially impossible of performance and so shortening its term.

Cur. adv. vult.

May 10. The following judgments were delivered:—

LORD ASQUITH OF BISHOPSTONE [read by BIRKETT, L.J.]. The attitude of the claimants, as expressed by their letter of September 21, 1948, and thereafter was that the corporation, by making the new by-law in 1948, was then and thereby evincing an intention to prevent them from performing the contract according to its tenor as from November 1, 1950, when this new and crippling provision was timed to take effect; and that this amounted to an anticipatory repudiation of the contract by the corporation entitling the claimants to proceed immediately—in 1948—for a declaration that, as from September 1948, they themselves were no longer bound. This they did in the arbitration. The question of law arising on the award in the form of a special case was thus formulated by the arbitrator: "The question for the opinion of "the court is: Did the act of the respondents in their capacity "as port health authority in sealing and procuring the con-"firmation of the new by-laws, confirmed on July 16, 1948, "amount to a repudiation by the corporation of the agreement "dated December 17, 1936, so as to entitle the claimants in law, "notwithstanding that by-law No. 2 was not to come into opera-"tion until November 1, 1950, to treat the said agreement as "determined on September 21, 1948?"

The substantial question therefore is whether the act of the corporation in making by-law No. 2 of 1948 was a breach of the contract going to its root and an anticipatory breach entitling the claimants to elect to say in 1948 that they were no longer bound by it as from 1948, even though the by-law was not to take effect till November 1950. It is apparently not disputed by the corporation that if the act in question was not a breach and not a repudiation, it was, at the lowest, a factor which made the contract commercially impossible of performance after November 1, 1950, and which frustrated it as from that date.

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The first question, therefore, is whether the corporation's act in making by-law No. 2 of 1948 was a breach of the contract at all. I will consider this first in abstraction from cl. 13 of this contract. The claimants argue that it is an implied term of every, or almost every, contract between A and B (and certainly of this contract) that A shall not prevent or disable B from performing the contract and vice versa, and that this was just what the corporation did by the act in question. In general, no doubt, it is true that a term is necessarily implied in any contract whose other terms do not repel the implication, that neither party shall prevent the other from performing it, and that a party so preventing the other is guilty of a breach.

But an act cannot be a breach of a term of the contract—express or implied—(let alone a repudiation) unless the term in question is valid. There can be no breach, if the term in question is illegal, contrary to public policy, or (in the case of a corporation) ultra vires the contracting party, or for some other reason waste paper, because in such a case there is no binding obligation, and only a binding obligation can be violated. You cannot break a rope of sand. It starts broken. The term sought to be implied in this case is one whereby the corporation—a legislative body charged by statute in imperative language with the duty of making by-laws relating, inter alia, to the removal of the refuse in the interests of the public health in the Port of London—or, to be precise, to prevent nuisances arising from such refuse—engages not to make any by-laws for this purpose which should lay on the claimants burdens other and more severe than those provided for in cl. 1 of their contract with the corporation, and, therefore, prevent the claimants from fulfilling the contract by complying with cl. 1, without more.

I consider that such a term, whether implied or even express, could not be valid. The language of s. 84, sub-s. 1 (*a*), of the Public Health (London) Act, 1936, is mandatory. The provision is as follows: "(1.) Every sanitary authority shall make by-laws "(*a*) for the prevention of nuisances arising from snow, ice, salt, "dust, ashes, rubbish, offal, carrion, fish or filth or other matter "or thing in any street". If the suggested term were express, it would have to take some such form as this: "True we are "charged by Parliament with the duty of making such by-laws "with reference to refuse as may be called for from time to time "by considerations of public health. But even if these considerations call, and call peremptorily, for a provision not less "stringent than that made by the 1948 by-laws, even if a second "plague of London is likely to occur, unless such provision is "made, we undertake in such an event to neglect or violate our "statutory duty so far as the requirement of such a by-law may "exceed the requirements imposed by cl. 1 of our contract with "the claimants". Such a contractual provision would seem to be plainly invalid.

In *York Corporation* v. *Henry Leetham & Sons Ld.* (16) Russell, J., had to decide a somewhat similar point. The plaintiffs were entrusted by statute with the control of navigation, in part, of the Rivers Ouse and Fosse with power to charge such tolls, within limits, as the corporation deemed necessary to carry on the two navigations in which the public had an interest. The corporation made two contracts with the defendants under which they agreed to accept, in consideration of the right to navigate the Ouse, a regular annual payment of 600*l.* per annum in place of the authorized tolls. The contract as regards navigation of the Fosse was on similar lines. It was held by Russell, J., that the contracts were ultra vires and void because under them the corporation had disabled itself, whatever emergency might arise, from exercising its statutory powers to increase tolls as from time to time might be necessary. The judge based his decision on the incapacity of a body charged with statutory powers for public purposes to divest itself of such powers or to fetter itself in the use of such powers.

It is obvious how relevant this case, if well decided, is to the present. It has in fact been criticized in *Southport Corporation* v. *Birkdale District Electric Supply Co. Ld.* (17). In that case it was pointed out that the body executing the statutory duties in the *York* case (16) (as in the *Southport* case itself (17)) was a trading corporation, and that the discharge of such duties by such a corporation would be facilitated rather than fettered by a reasonable latitude of discretion in fixing prices, charges or tolls. In *Ayr Harbour Trustees* v. *Oswald* (18) it was held by the House of Lords that, where a statute confers power on any body, whether one which is seeking to make a profit for shareholders, or one acting solely for the public good, to take lands compulsorily for a particular purpose, a contract purporting to bind such a body and their successors not to use the powers is void. Like the Ayr Harbour Trustees in that case, the corporation in the present case was one acting solely for the public good: see also *Mulliner* v. *Midland Ry. Co.* (19).

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(16) [1924] 1 Ch. 557.
(17) [1925] Ch. 794.
(18) (1883) 8 App. Cas. 623.
(19) (1879) 11 Ch. D. 611.

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In the present case the corporation act in a dual character, though in both characters they are a sanitary or health authority, not a body trading for profit. Qua sanitary authority for the City, they have to employ contractors, and it was in this capacity that they entered into their contract with the claimants. Qua health authority for the Port of London, they are charged with making by-laws for the prevention, inter alia, of nuisances arising from dust, ashes, rubbish, etc., in the port. Neither in the former capacity nor in the latter (which is the directly relevant one) are they a trading corporation. [They are charged with the duty of making by-laws to promote public health, inter alia, by dealing with refuse; and the considerations which were thought relevant in the *Southport* case (17) (so far as that decision threw doubt in the *York* case (16)) have no application here. [In this setting it would seem that the implied term relied on would impose an unwarrantable fetter on the corporation in the exercise of their statutory duties under s. 84, sub-s. 1 (*a*), of the Public Health (London) Act, 1936.]

The second argument on which the claimants relied was that, apart from any implied term, the express terms of cl. 13 of the agreement of December 17, 1936, preclude the corporation from passing the by-laws of 1948. The first few lines of the clause run: " Subject to the provisions of cl. 1 hereof, the contractors " shall at all times observe and comply with the by-laws of the " port health authority of the Port of London ". This, it is said, means that the claimants bind themselves contractually to observe by-laws which (like the only ones in force when the agreement was made) fall short in stringency of the obligations in cl. 1, but that the obligations set out in cl. 1 (as to coamings and the like) which must also be complied with (owing to the words " subject to ") constitute the high-water mark, or, to adopt the cant of today, the " ceiling of " the claimants' obligations in this matter. " Subject to " is read as meaning " rising to, but not " exceeding ". I am by no means convinced that that is the true construction. What may be meant is that in all events cl. 1 must be complied with, and that any by-laws passed from time to time, whether falling short of or exceeding cl. 1 in severity, must also be complied with. But even if the claimants were right on the point of construction, it seems to me that the answer to this argument is in substance the same as the answer to the first argument. The claimants must have recourse once more to

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their implied term: "Under the contract I am not bound to do "more than cl. 1 prescribes—that is the 'ceiling'; you are bound "not to prevent me from fulfilling my obligations by a simple "compliance with cl. 1. You have done this by passing the "by-laws of 1948". Such an implied term, for reasons I will not repeat, would in my view be ultra vires.

In the result, I am of opinion that the decision of Lord Goddard, C.J., was well-founded and that the appeal should be dismissed.

Birkett, L.J. I am content to say for myself that I entirely agree with the judgment of Lord Asquith, with the reasons given, and with his conclusions.

Harman, J. I agree with the result arrived at by my Lord and with the reasoning by which he reaches it. Sir Walter Monckton, in his very attractive reply, argued that the term to be implied in this contract is that the corporation will not seek to hold the company to it, while imposing an obligation more stringent than that imposed by cl. 1, and that in effect the corporation have admitted the existence of this term by agreeing that they cannot hold the company to the contract after the new by-laws come into force. So far I follow him; but when he goes on to submit that the duration of this contract is an essential term, and that in effect by passing the new by-laws the corporation have shortened the term and thereby committed a breach which entitled the company to treat the contract as at an end from the time when the by-laws were passed, I part company with him. It seems to me that the corporation, by deferring the coming into force of the by-laws, did no more than give notice of them in advance for the convenience of lightermen using the river, and that this act of courtesy cannot put the claimants in a better position than they would be in if no such notice were given. In fact this contract, when made, was indefinite in duration and might have expired before now; and it is only subsequent events which have shown that it might have lasted for some time yet. The making of the new by-laws has been looked upon by both parties as a supervening event not contemplated by either of them when the contract was made, and, therefore, producing what is usually called frustration. From this point of view it is irrelevant that the supervening event was brought about by the corporation itself in another capacity. The argument seems to me an attempt to import into the doctrine of frustration the doctrine of anticipatory

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breach. In my judgment, this attempt fails because the two cannot be married in the way suggested.

As to the question of construction, in my judgment Mr. Williams provided the right answer when he said that cl. 13 adds a contractual obligation to the statutory liability of the company to observe the by-laws and that, whereas the contractual obligations are limited by cl. 1 and, therefore, subject to it, the statutory obligations are not. In effect the words "subject to the provisions "of cl. 1 hereof" mean "without prejudice to the obligations "of the contractors under that clause". So read, the contract has not been broken by the corporation and the doctrine of anticipatory breach has no place.

Appeal dismissed.

Solicitors: *E. F. Turner & Sons; The City Solicitor.*

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FRANCIS JACKSON DEVELOPMENTS LD. *v.* HALL AND ANOTHER.

[Plaint No. 1093.]

Landlord and Tenant—Rent tribunal—Notice to quit to sub-tenant of furnished house—Application by sub-tenant for security of tenure—"The notice to quit . . . shall not . . . have effect before the "determination of the application"—Meaning—Contractual sub-tenancy not extended as such—Name of landlord not given in application—Regulation of Minister of Health directory not imperative—Application not a nullity—Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950 (*SI* 1950, *No.* 1763), *reg.* 2—*Landlord and Tenant (Rent Control) Act,* 1949 (12 & 13 *Geo.* 6, *c.* 40), *s.* 11, *sub-ss.* 1 *and* 2.

Although the Minister of Health is given power under s. 6, sub-s. 5, of the Landlord and Tenant (Rent Control) Act, 1949, to give directions as to the form which an application for security of tenure under s. 11 of that Act may take, he has no power to impose conditions of validity as to the form of such an application when Parliament itself has required none. Accordingly, reg. 2 of the Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950, which requires the applicant (the tenant) under s. 11 to specify the name of the landlord, must be construed as directory and not imperative, for otherwise the Minister would be exceeding his powers.

Where, therefore, on such an application, the tenant gave the name of a person as landlord who was not the landlord, and so failed to give the name of the landlord, in accordance with the regulation:—

Held, that the application was not a nullity.

A tenant sublet the whole of a dwelling-house furnished to a sub-tenant, but subsequently gave him notice to quit the premises, which expired on December 9, 1950. On December 7, 1950, the sub-tenant applied to the rent tribunal for security of tenure under s. 11, sub-s. 1, of the Landlord and Tenant (Rent Control) Act, 1949. By s. 11, sub-s. 2: "On an application being made under this "section—(*a*) the notice to quit to which the application relates "shall not, unless the application is withdrawn, have effect before "the determination of the application".

On December 13, 1950, the landlord brought an action in the county court against the tenant claiming possession of the premises. The landlord contended that, by reason of the decision in *Prout* v. *Hunter* [1924] 2 K. B. 736, the tenant had ceased to be protected by the Rent Restriction Acts, since the tenant had sublet the whole house furnished, and this sub-tenancy was still in existence on December 13, 1950, when the landlords claimed possession of the premises.

Held, that the tenant was still protected by the Rent Restriction Acts, because the doctrine laid down in *Prout* v. *Hunter*, supra, applied only to contractual furnished sub-tenancies, and that in this case, notwithstanding the words of sub-s. 2 of s. 11 of the Act of 1949, the contractual furnished sub-tenancy had expired on December 9, 1950. If the literal interpretation of a statute led to a result which Parliament could never have intended, the courts must reject that interpretation and seek some other which did give effect to the intention of Parliament.

Observations of Denning, L.J., in *Seaford Court Estates Ld.* v. *Asher* [1949] 2 K. B. 481, 499 followed.

APPEAL from Judge Tudor Rees sitting at Uxbridge county court.

The plaintiff company were the owners of No. 120 Burnham Avenue, Ickenham, Middlesex. The defendants were members of a family which had occupied the house for twelve years at a rent of 18*s.* 6*d.* a week, the tenant paying the rates. On August 5, 1949, the first defendant, Mrs. Hall, then tenant, sublet part of the house furnished to one Perkins at a rent of 5*l.* a week, but she continued to live in the rest of the house herself. On July 24, 1950, the tenancy was transferred from the name of Mrs. Hall into that of Mrs. Tagg, her mother, the second defendant, but Mrs. Hall continued to live on the premises and to do all the business connected with the house on behalf of her mother.

Perkins wanted more room in the house, because his wife was expecting a baby. Mrs. Hall then, acting on behalf of her mother, on November 11, 1950, sublet to him the rest of the house furnished on his paying an extra 1*l.* a week. Perkins paid Mrs. Hall 12*l.* for two weeks in advance and she and her mother left the house. They only left temporarily to help Perkins in his difficulty, leaving their furniture and some of their clothes and retaining the key of the outside shed. It was clear that they had an intention to return, and therefore, on the principle in *Skinner* v. *Geary* (1), had not lost the protection of the Rent Restriction Acts.

Thereupon, the plaintiff company gave Mrs. Hall and her mother notice to quit dated November 28, 1950, expiring on December 11, 1950. Mrs. Hall gave Perkins notice to quit dated November 30, 1950, to expire on December 9, 1950. If Perkins had obeyed that notice by quitting the house on December 9, Mrs. Hall and her mother could have re-occupied the house before December 11, 1950, when their own tenancy at common law would have expired, and they would then have entered upon a statutory tenancy protected by the Rent Restriction Acts.

Perkins, however, on December 7, 1950, applied to the local rent tribunal to fix a reasonable rent, and under s. 11 of the Landlord and Tenant (Rent Control) Act, 1949, (2) for security of tenure. In his written application he in error named Mrs. Hall as his landlord, she being the only person he had known in the matter. If this application was effective, Perkins obtained security of tenure of the house, at any rate until the rent tribunal had heard his application, by virtue of s. 11 of the Landlord and Tenant (Rent Control) Act, 1949 (2).

The plaintiff company, the superior landlords, then by their solicitors (who had acted for Perkins) issued a plaint in Uxbridge county court against the two defendants claiming possession of the whole house on the ground that it had been let furnished by the tenant without their knowledge or consent. Perkins was not added as a defendant since, if the company obtained an order for possession against the defendants, they intended to let the house to him unfurnished.

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(1) [1931] 2 K. B. 546.

(2) Landlord and Tenant (Rent Control) Act, 1949, s. 11, sub-s. 1: "Where a contract to which the Act "of 1946 applies has been referred to "a tribunal under that Act, and the "reference has not been withdrawn, "the lessee may, at any time when "a notice to quit has been served "and the period at the end of which "the notice takes effect (whether by "virtue of the contract, of the Act of "1946 or of this section) has not "expired, apply to the tribunal for "the extension of that period: Pro-"vided . . .".

Sub-s. 2: "On an application being "made under this section—(*a*) the "notice to quit to which the applica-"tion relates shall not, unless the "application is withdrawn, have "effect before the determination of "the application".

The claim in the county court was based on the ground that the tenant without the consent of the landlord had sublet the whole of the dwelling-house and that it was reasonable to make an order under s. 3 of, and para. (*d*) of Sch. I to, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The county court judge found that Mrs. Tagg had so sublet the house without the consent of the company, but he dismissed the claim because in all the circumstances it would not be reasonable to make an order for possession.

The landlords appealed.

At the hearing before the county court judge the landlords took the point that they claimed possession of the house on a ground in relation to which "reasonableness" was not in issue, namely, on the ground that the whole house was sublet furnished on December 13, 1950, when the plaintiffs instituted the action; but the judge was not referred to any of the authorities and he rejected it. When he looked into the matter afterwards he thought that he ought to have ordered possession, and he made a note after the judgment in which he wrote: "Upon subsequent reflection, "and upon a reference to the authorities (there is no library at "the court), I have come to the conclusion that the foregoing "judgment is wrong in law. I had overlooked, and my attention "was not drawn to *Prout* v. *Hunter* (3). If that authority had "been before me, I should have held that it completely covered "this case".

Gordon Hardy for the plaintiff company, the landlords.

The court, having read the note made after judgment by the county court judge, called on counsel for the tenant.

Gilbert Dare for the tenant. This house was not sublet furnished on December 13, 1950, when the plaintiff company began this action. The decision in *Prout* v. *Hunter* (3) is therefore not applicable: see *Leslie & Co. Ld.* v. *Cumming* (4). The contractual sub-tenancy to Perkins had expired on December 9, 1950, when the notice to quit served on him expired, four days before the landlords brought their action for possession. On December 13, 1950, Perkins was a trespasser at the house, since

(3) [1924] 2 K. B. 736.

(4) [1926] 2 K. B. 417.

his application to the rent tribunal on December 7, 1950, was a nullity. That application named Mrs. Hall as the landlord of the premises instead of Mrs. Tagg. That was in breach of reg. 2 of the Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950 (S.I. 1950, No. 1763), by which the tenant making this application to the rent tribunal must specify the name and address of the landlord. Perkins did not specify the name of the landlord, who was Mrs. Tagg. Accordingly, Perkins did not obtain security of tenure under s. 11 of the Landlord and Tenant (Rent Control) Act, 1949. So there was, in fact, no application to the rent tribunal. That appears to be the view taken in Megarry on the Rent Acts (6th ed.), at p. 358.

Secondly, the doctrine laid down in *Prout* v. *Hunter* (5) applies only to contractual furnished sub-tenancies. Perkins' contractual furnished sub-tenancy ended on December 9, 1950. The protection to Perkins arose only from sub-s. 2 of s. 11 of the Act of 1949 and not from the contract of subletting. The house was not sublet to Perkins so as to bring the principle of *Prout* v. *Hunter* (5) into play since Perkins occupied the house after December 9, 1950, against the wishes of Mrs. Tagg and Mrs. Hall, as if he had been a trespasser.

Gordon Hardy for the landlords (who was not called on to argue on the first point). As to the second point, s. 11, sub-s. 2 (*a*), of the Act of 1949 provides that on an application to a rent tribunal under the section " the notice to quit to " which the application relates shall not . . . have effect before " the determination of the application ". The notice to quit to Perkins had, therefore, by reason of this statute no effect on December 13, 1950, when the plaintiffs made their claim for possession in the county court. At that date the whole house continued to be sublet to Perkins. The decision in *Prout* v. *Hunter* (5) was therefore applicable, and the plaintiff company, the landlords, were entitled to possession.

Cur. adv. vult.

May 10. DENNING, L.J., read the following judgment of the court:—Upon reading the note which the county court judge subsequently added to his judgment we called on Mr. Dare and asked him if he could support the judgment which was pronounced. He then sought to support it, as he was entitled to do, on the ground that the house was not sublet furnished on December 13, 1950, when the plaintiff company began this action and said that, therefore, the doctrine laid down in *Prout* v. *Hunter* (6) did not apply: see *Leslie & Co. Ld.* v. *Cumming* (7). He said that the contractual sub-tenancy to Perkins had expired on December 9, 1950, four days before the landlords brought their action for possession; and that, therefore, the house could not be said to be sublet furnished, notwithstanding the application made by Perkins to the rent tribunal.

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(5) [1924] 2 K. B. 736.

Mr. Dare put his argument in two ways: his first contention was that on December 13, 1950, Perkins was a trespasser. He said that the application by Perkins to the rent tribunal on December 7, 1950, was a nullity, because it named Mrs. Hall as the landlord instead of Mrs. Tagg. He said that every tenant who applies to a rent tribunal for security of tenure must, at his peril, comply with all the regulations made by the Minister and, in particular, the tenant must specify the name and address of the landlord and all other matters which are set out in the Landlord and Tenant (Rent Control) Regulations, 1949 (S.I. 1949, No. 1096), as amended by the Landlord and Tenant (Rent Control) (Amendment) Regulations, 1950 (S.I. 1950, No. 1763). If the tenant failed to specify in his application any of the matters required by the regulations, as, for instance, if he failed to specify the name of the landlord or his address or specified them wrongly, Mr. Dare contended that the application would be a nullity and the tenant would not have the security of tenure given by s. 11 of the Act of 1949. We cannot accept that contention. Take this very case: Mrs. Hall was the only person whom Perkins knew in the matter. She managed the house on behalf of her mother. She let it to Perkins and she gave him notice to quit in her own name. Mr. Dare admitted that the notice to quit in her name was good, but said that the application to the tribunal was not. We are quite sure that Parliament did not intend any such thing.

The Act of 1949 does not require an application to a rent tribunal to be in any prescribed form. It contemplates that applications under the Act will often be made by tenants who have no lawyers to advise them and no regulations by their side; and for this very reason it does not prescribe any formalities. It gives the Minister power to make regulations with regard to proceedings before rent tribunals, and that, no doubt, includes power to give directions as to the form which applications should take. But the Minister has no power to impose formal conditions

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(6) [1924] 2 K. B. 736.

(7) [1926] 2 K. B. 417.

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of validity on an application, when Parliament itself has required none. The regulations must, therefore, be construed as directory and not imperative, for otherwise the Minister would be exceeding his powers. So construed, it follows that an application to a rent tribunal is not a nullity, even though the name of the landlord is wrongly given. The application of Perkins made to the rent tribunal on December 7, 1950, was in our opinion an effective application under s. 11 of the Act of 1949, and gave him security of tenure until the application was heard or withdrawn. Accordingly, he was lawfully in occupation of the premises on December 13, 1950, when the landlords brought their action for possession.

The second contention of Mr. Dare was that the doctrine laid down in *Prout* v. *Hunter* (8) applies only to contractual furnished sub-tenancies; and that in this case the contractual sub-tenancy having expired on December 9, 1950, the house was not thereafter sublet to Perkins, so as to bring the principle of *Prout* v. *Hunter* (8) into play. He said quite correctly that the right of Perkins to occupy the house after December 9, 1950, arose not from any contract of sub-letting by Mrs. Tagg or Mrs. Hall, but only from s. 11 of the Act of 1949. Perkins thenceforward occupied the house against the will, and without the consent, of Mrs. Tagg and Mrs. Hall, as much as if he had been a trespasser. It would be strange if they should lose the protection of the Rent Restriction Acts by this manœuvre. In answer to this argument Mr. Hardy pointed out that s. 11 of the Act of 1949 said that, on an application to a rent tribunal, "the notice to quit to which "the application relates shall not, . . . have effect before the "determination of the application"; and he contended, therefore, that the furnished subletting continued. We agree that if the words of the Act are given their literal meaning, it would seem that the house was still sublet furnished on December 13, 1950, because, owing to the statute, the notice to quit had not then taken effect. We are quite sure, however, that Parliament did not mean *Prout* v. *Hunter* (8) to operate in those circumstances; for the result would be that, owing to the furnished subletting, the landlords would be able, as soon as their common-law right to possession arose, to evict not only the tenant but the sub-tenant also. In this particular case the landlords have said that they do not intend to evict Perkins, but the fact remains that they would have the legal right to do so. The result would be, therefore, that, by reason of Perkins' application for security of tenure, all of them, including Perkins himself, would lose their security of tenure. We do not think that we should adopt a construction of the Act which would produce a result so opposed to the intention of Parliament. If the literal interpretation of a statute leads to a result which Parliament can never have intended, the courts must reject that interpretation and seek for some other interpretation, which does give effect to the intention of Parliament: see *Seaford Court Estates Ld.* v. *Asher* (9). This can be done here by holding that when a subtenant of the whole of a furnished house applies to a rent tribunal under s. 11 of the Landlord and Tenant (Rent Control) Act, 1949, the effect is not to extend the contractual sub-tenancy as such, but only to give the sub-tenant a statutory security of tenure as against the tenant. During the period of this statutory security the house is not sublet furnished so as to bring the doctrine of *Prout* v. *Hunter* (10) into play, because that doctrine only applies to contractual sublettings.

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(8) [1924] 2 K. B. 736.

In our opinion, therefore, *Prout* v. *Hunter* (10) does not cover this case. The judgment which the county court judge gave at the trial was correct and should be affirmed. We were told that the rent tribunal have given Perkins security of tenure until May 11, 1951, only. He will then have to leave and Mrs. Tagg and Mrs. Hall will resume occupation, as they would have done on December 9, 1950, if Perkins had complied with their notice to quit. They will thus keep the protection of the Rent Restriction Acts. The appeal must be dismissed.

Appeal dismissed.

Solicitors: *Champion & Co., for Turberville Smith & Co., Uxbridge; Lucien Fior.*

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(9) [1949] 2 K. B. 481, 499.

(10) [1924] 2 K. B. 736.

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May 22, 23.

Evershed, M.R., Denning, L.J., and Roxburgh, J.

MARCROFT WAGONS LD. *v.* SMITH.

[Plaint F. No. 294.]

Landlord and tenant—Rent restriction—Daughter of deceased statutory tenant permitted to remain in premises—Weekly payments accepted by landlords—Licence not tenancy granted.

The statutory tenant of a dwelling-house having died in 1938, his statutory tenancy devolved by virtue of s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, on his widow, who, until her own death on March 16, 1950, continued to live in the house as statutory tenant with her daughter. On March 27, 1950, the daughter asked the landlords' agent to have the tenancy transferred into her own name. This he refused, because, he said, the landlords would require the house for an employee. However, he accepted a sum from the daughter equal to two weeks' rent, and she continued thereafter to pay each week the same sum as the widow had paid for rent. In September, 1950, the landlords brought proceedings for possession. The county court judge made an order, holding that the landlords had not agreed to grant any estate in the land to the daughter, that no tenancy had been created, and that she was merely a licensee. On her appeal:—

Held, that there was evidence which entitled the county court judge to find that the daughter was a licensee only and that his finding should not be disturbed.

While at common law before the Rent Restriction Acts came into operation a person in the position of the daughter who remained in possession with the landlord's consent would have become a tenant at will, and, when rent was accepted, a weekly tenant, it was no longer proper for the courts to infer a tenancy at will or a weekly tenancy from the mere acceptance of payments for occupation. A new tenancy should only be inferred when the facts warranted it. The question was what was the intention of the parties. If the acceptance of periodical payments could be explained on some other footing than that a contractual tenancy was being created, the creation of a tenancy need not be inferred. Where a person was in possession at the death of a statutory tenant and it was uncertain whether he was entitled to claim a statutory tenancy, or where motives of kindness would lead a landlord to postpone claiming possession immediately, the fact that the landlord gave such a person permission to remain in occupation on his making a weekly payment did not necessarily mean that a weekly tenancy had been created. Such an occupant might be a licensee, in the sense that he did not acquire any interest in the land. The longer such occupation continued, however, the more likely it would be that the court would infer that a weekly tenancy had been created.

Semble, where a landlord has let a new occupier into exclusive possession, prima facie the inferences to be drawn are very different from those proper, though not necessarily, to be drawn, where a person is in actual occupation at the determination of a statutory tenancy.

Minister of Agriculture and Fisheries v. *Matthews* [1950] 1 K. B. 148 considered.

APPEAL from Judge Wrangham sitting at Ashby-de-la-Zouch county court.

In 1901 one Sydney Aris was already tenant of 6 Mantle Lane, Coalville, Leicester, where his daughter, the defendant, Mrs. Dorothy May Smith, was born in that year. Aris continued in occupation of the premises until his death on March 8, 1938. He was survived by his widow, who continued to live in them with the defendant until her death on March 16, 1950. On March 27, 1950, the defendant asked the agent of the plaintiff landlords, Marcroft Wagons Ld., to transfer the tenancy of 6 Mantle Lane to herself. He refused to do so, because, he said, the landlords would want the premises for one of their employees. However, he accepted from the defendant a sum equal to two weeks' rent, and thereafter she continued to pay weekly to the landlords a weekly sum equal to the rent which had been paid by the widow during her life. In September the landlords, who then wanted the premises, required the defendant to leave, and, on her refusing to do so, brought these proceedings to recover possession.

The landlords' right to possession depended in the first place on whether Aris at his death was a contractual tenant or a statutory tenant. If he were then a contractual tenant, his widow, who was admittedly a statutory tenant at her death, would have been the first statutory tenant and the defendant would have been entitled to succeed to her statutory tenancy under s. 12, sub-s. 1 (*g*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. On the other hand, if Aris were at his death a statutory tenant, s. 12, sub-s. 1 (*g*), would not apply, the statutory tenancy having already devolved under it once, and the defendant could not claim to hold over under the sub-section. The county court judge found, as a fact, that Aris was at his death a statutory tenant.

The defendant's second contention was that the true inference from what took place at her meeting with the agent on March 27, 1950, coupled with the correspondence and the length of time she had been allowed to remain in possession, was that the landlords had granted her a new tenancy. The county court judge rejected this contention also, holding that the landlords had merely granted to the defendant a licence to occupy the premises. He accordingly made an order for possession.

The defendant appealed.

Mrs. Yetta Frazer for the defendant. It is contended that the result of the interview of March 27, 1950, was to create a tenancy, since the landlords then agreed to grant to the tenant an exclusive right to occupy the premises. Such an exclusive right of occupation coupled with the acceptance of weekly payments is not compatible with the grant of a licence only. The law is correctly stated in Halsbury's Laws of England (2nd ed.), vol. 20, at p. 8. Whether the defendant was a tenant at will or a weekly tenant is immaterial. Once she had become a contractual tenant, she is entitled to the protection of the Rent Restriction Acts.

[She referred to *Buck* v. *Howarth* (1) and *Chamberlain* v. *Farr* (2).]

J. A. Grieves, for the landlords, was not called on to argue.

EVERSHED, M.R. [after stating the facts]. It is quite plain that the position of the defendant may vary first of all according to whether her father at his death in 1938 was or was not a contractual tenant. If he was then a contractual tenant, his widow, who remained in possession after his death, was at first also a contractual tenant; but it is conceded that if she was a contractual tenant at the beginning of her widowhood, she undoubtedly later became a statutory tenant. If at her death in March, 1950, the widow had been the first member of the family to be a statutory tenant, it would follow (and this is conceded by Mr. Grieves) by virtue of s. 12, sub-s. 1 (*g*), of the Rent Restriction Act of 1920 that the defendant has qualified as a person entitled to remain in occupation, for she was a member of the statutory tenant's family, who had resided with the statutory tenant for the requisite length of time before the latter's death. If, on the other hand, Sydney Aris before his death had ceased to be a contractual tenant and had become a statutory tenant, then (and again this is conceded) his widow acquired the benefits conferred upon members of a statutory tenant's family by s. 12, sub-s. 1 (*g*). With her own death, however, the operation of that sub-section would be exhausted, so that the defendant would not be able to pray it in aid in order to protect her continued occupation.

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(1) [1947] 1 All E. R. 342.

(2) (1942) 112 L. J. (K. B.) 206.

It will be convenient then to deal immediately with the question whether Sydney Aris had ceased to be a contractual tenant during his life. [His Lordship considered the evidence on this question and the finding of the county court judge and continued:] I can see no reason for saying that there was no evidence on which the judge was entitled to find, as he did, that there had been a valid determination during Aris's life of his contractual tenancy.

If that conclusion be right, it follows that the defendant cannot rely on s. 12, sub-s. 1 (*g*), of the Act of 1920. Her case must depend (and this has been the main contention put forward to this court) upon the submission that at her meeting with the agent on March 27, and as a result of what took place then and thereafter, the court should infer that a new contractual tenancy between the landlords and the defendant came into existence. I confess that I find this a difficult matter. The court is in a sense hedged around with difficulties, in that whichever way it decides, it is suggested that our decision may lead in other cases to results not entirely satisfactory. I am, however, undeterred by that.

It is a trite saying that each case depends on its own particular facts, and what we decide in this case should, therefore, not be a guide to the proper inference to be drawn from different facts in a different case. The judge, having referred to the evidence given on what transpired on March 27, 1950, and having referred to the arguments put forward by the counsel on both sides, said: "I "think both of the arguments are extremely attractive and at first "I was convinced provisionally that anyone who was allowed to "live in a house, and deemed to have exclusive occupation of it, "must be a tenant, but I have come to the conclusion that upon "this branch of the case I ought to hold that the true interpretation of what took place on March 27, 1950, is that the landlords "did not agree to grant an estate in land, that is to say, that they "did not create a tenancy—that what was done was solely to "grant a licence for an undefined time in consideration for her "paying a sum equal to that paid by her mother by way of rent. "I think it really follows from the decision of Cassels, J., in "*Minister of Agriculture and Fisheries* v. *Matthews* (3), where "he held that occupants of requisitioned premises were licensees, "that persons who inhabit premises with exclusive possession can "be mere licensees, and that the proper interpretation is that the "defendant was offered and accepted that kind of licence".

(3) [1950] 1 K. B. 148.

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Mrs. Frazer has attacked that conclusion of the judge, first, on the ground that it contains, on the face of it, a mis-statement of law, since if in point of fact two parties agree that one of them is to have the exclusive possession of premises belonging to the other, paying a rent for it, the result must be to bring into existence a tenancy of some kind—either a tenancy from week to week or a tenancy at will—and, so far as this case is concerned, it does not matter what the terms of the tenancy were if a tenancy was created. Secondly, on the ground that the judge misled himself by his citation of the case before Cassels, J. (4). That case related to premises which had been requisitioned by a Minister of State, who had let persons into occupation of the premises on terms which, on the face of them, bore all the marks of tenancy. Since a Minister has no estate in requisitioned property, it followed that he could not grant an estate which he had not himself.

That case illustrates one of the features of modern times, namely, the creation of rights of occupation having in most respects the attributes of a tenancy but lacking the estate in land which is a necessary incident of a tenancy. But illustrating, as it does, that modern conception, it is, of course, as Mrs. Frazer points out, not quite an analogy to the present case, for the case really turned on the circumstance that the Minister could not grant something which he himself did not have to grant.

There is much force in Mrs. Frazer's argument, and I can well understand that a judge trying this case might have come to the conclusion that a tenancy had been created and that that was the right inference as to the intention of the parties. I might have so decided it myself. But whatever be the significance attached to the reference to Cassels, J.'s decision in *Minister of Agriculture and Fisheries* v. *Matthews* (4), and however open, as I think, with all deference, the words of the judge's judgment are in some respects to criticism, it is plain that he, having seen the witnesses and heard their evidence and also having referred to the correspondence in September, 1950, came to a conclusion of fact that there was here no intention on the part of either the landlords' representative on the one hand or of the defendant on the other, to create a tenancy—no intention, indeed, to do otherwise than to allow the existing state of affairs (whatever in law it was) to continue for a limited time.

[His Lordship reviewed the evidence and continued:] The most troublesome matter, speaking for myself, has been the length of time that elapsed between March and September before the landlords took any further step. There is no doubt that the intricacies of modern life, as reflected in the Rent Restriction legislation, have made, in many respects, the relationship between landlords and tenants assume an artificial and indeed unfriendly character, which is somewhat to be deplored. In particular, landlords, who may have ordinary human instincts of kindliness and courtesy, may often be afraid to allow to a tenant the benefit of those natural instincts in case it may afterwards turn out that the tenant has thereby acquired a position from which he cannot subsequently be dislodged. In the general interest, it may be necessary that the relationship should have to assume a much more formal character than would otherwise be necessary; nevertheless, I should be extremely sorry if anything which fell from this court were to have the effect that a landlord could never grant to a person in the position of the defendant any kind of indulgence, particularly in circumstances such as existed in March, 1950, when the defendant lost her mother. It seems to me that it would be quite shocking if, because a landlord allowed a condition of affairs to remain undisturbed for some short period of time, the law would have to infer that a relationship had arisen which made it impossible thereafter for the landlord to recover possession of the property, when, admittedly, by taking proper measures from the start, he could have got possession.

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(4) [1950] 1 K. B. 148.

There is another very important matter to be borne in mind in considering what inference should be drawn in cases of this kind. Until, in the present century, the Rent Restrictions Act came into play, the law broadly speaking necessarily inferred, when exclusive possession was granted to one of the property of another at a rent payable to that other, that a tenancy had been created. The law did not recognize that those conditions were compatible with any other kind of relationship. That, I think, sufficiently appears from a passage in Halsbury's Laws of England (2nd ed.), vol. 20, at p. 8. But it is now clear that, to use the formula which I think has been applied, a new "monstrum horrendum, informe, ingens", has come into our ken—the conception of a statutory tenancy—the conception that a person may have such a right of exclusive possession of property as will entitle him to bring an action for trespass against the owner of that property but which confers no interest whatever in the land: such a person is unable to dispose of the land by grant or by testamentary disposition. It is, as has been said, a statutory right of irremovability. Many illustrations have been before the court.

A few sentences from the judgment of Bankes, L.J., in *Remon* v. *City of London Real Property Co. Ld.* (5) will illustrate as well as possible the strangeness, at any rate as it would have appeared to a pedantic lawyer of the nineteenth century, of this conception. Referring in that case to the person claiming to retain possession of the premises, the Lord Justice said (6): "In no ordinary sense "of the word was the respondent a tenant of the premises on "July 2. His term had expired. His landlords had endeavoured "to get him to go out. He was not even a tenant at sufferance. "It is however clear that in all the Rent Restriction Acts the "expression 'tenant' has been used in a special, a peculiar sense, "and as including a person who might be described as an ex-"tenant, someone whose occupation had commenced as tenant "and who had continued in occupation without any legal right "to do so except possibly such as the Acts themselves conferred "upon him".

Every owner of property today appreciates that the effect of the Rent Restriction Acts is such that in all human probability, should he claim or desire possession of the property, he will have to go to the county court for an order: in other words, a landlord's right to recover possession is now a right to go to the county court for an order for possession. In judging of the inference to be drawn from such events as those which took place here, it seems to me to be vital to bear in mind that that is the background against which people must now discuss and regulate their affairs.

What, on March 27, 1950, was the defendant's position? She had lived in this house all her life. She was the daughter of a man who undoubtedly had been the contractual tenant and might or might not have become a statutory tenant before he died. She was also the daughter of a woman who, as is now conceded, undoubtedly was the statutory tenant of the premises when she died. If ever there was a case in which it would appear tolerably clear to any thinking person that if possession were required, and the defendant were unwilling voluntarily to vacate, it would be necessary to go to the court for an order, this would clearly be such a case.

It is therefore not surprising that when the defendant went to call on the landlords' agent and asked for the tenancy to be transferred to her, he declined to do so. It is not surprising (if we attribute to the agent the ordinary decencies of human life) that he did not seek, within a few days of her mother's death, to evict the defendant from the house where she had lived all her life—which if Mrs. Frazer were right it was presumably his duty to himself and his employers to do in order to protect their rights.

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(5) [1921] 1 K. B. 49.

(6) Ibid. 54.

In other words, it seems to me the natural thing, in such circumstances, and bearing in mind that, according to the agent, the landlords wanted the house for one of their own employees, that he should say, in effect, that he could not put the defendant in the position of being tenant; that he did not want to disturb her immediately; that if he did not want the house for one of the landlords' workmen he might be able to do something better; but that, as at present advised, according to his instructions, he could not do that; but that for the moment the defendant might stay on. If three or four or five or six weeks had elapsed, and then the agent had told the defendant that they had given her a reasonable time, and that now they must ask her to go, it seems to me that the defendant's case would have been almost unarguable. The agent, however, allowed the defendant to remain in possession for six months. That length of time would have been a powerful consideration to any judge considering what, at the end of that period, was the proper inference to be drawn from the evidence. In all the circumstances, I cannot think that six months is necessarily so long a period that we must treat the judge's conclusion that there was no change of intention on the part of either party between March and September, 1950, as wrong. In other words, at the end of that six months, as at the beginning, the real inference was that, the agent and the defendant having met, it was agreed between them that the status quo should be allowed for the time to continue, and it did continue. Although I agree with Mrs. Frazer that Cassels, J.'s decision in *Minister of Agriculture and Fisheries* v. *Matthews* (7) is of a rather different character, nevertheless I think that in the circumstances the permission given to the defendant does not in the eyes of the law necessarily involve the inference of a tenancy. It is compatible with the conception, which is to be found in the statutory tenancy under the Rent Restriction Acts, and is to be found in other examples, of a right to occupy premises with many of the attributes of a tenancy but without the essential qualification of any interest in land. The judge had evidence which entitled him so to find, and, on the whole, I have come to the conclusion that we ought not to disturb that finding of fact.

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(7) [1950] 1 K. B. 148.

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Mrs. Frazer put this argumentum ad terrorem before us: that by such a decision we should be inviting all landlords to evade the Act by never granting a tenancy but saying "We will merely "let you live as a licensee in this house". I am not frightened by that argument. I think that where the question arises out of a new relationship between an owner of property and an occupant, the inference to be drawn, when the occupant is first allowed to go into exclusive possession, is prima facie very different from the inference proper to be drawn, though not necessarily to be drawn, in a case such as this, where the person in occupation has lived there, as the defendant has, for a long period of time and has in effect succeeded to the occupational privileges (to use a somewhat colourless phrase) of the previous occupant.

Our attention was drawn to *Steel* v. *Cockcroft* (8). That case has on the face of it some little similarity to the present, for the person against whom possession was sought happened to be a child of parents both of whom had successively lived in the house, as had the parents of the defendant. The other facts were not by any means identical. I mention the case because it does seem to show that the circumstance which I think so important, namely, the existence of this conception of an occupational right without an estate in the land, may alter or affect the inference to be drawn from facts which, in other days, would have been held to amount to a tenancy. That circumstance was considered in *Steel* v. *Cockcroft* (8) and was relevant to the conclusion in that case, which is at least not inconsistent with the conclusion at which I arrive in the present case.

I have come to the conclusion that this appeal fails and ought to be dismissed.

DENNING, L.J. I agree. The original tenant, Sydney Aris, had been in the house ever since 1901, and he had died in 1938. The first question is whether he, in the course of his time, became a statutory tenant. The only evidence on that point was that his daughter said: "I think the rent had been increased. I can "remember it being put up a time or two. I think we had to "pay when the rates went up". I think that that was sufficient evidence from which the judge could infer that valid notices of increase had been given and that Aris had become a statutory tenant. As I pointed out in *Brock* v. *Wollams* (9), when a tenant has been in occupation for many years, the court may have to act on very slight indications in determining whether or not a statutory tenancy has arisen. I think that this evidence was sufficient.

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(8) Ante, 429.

(9) [1949] 2 K. B. 388, 396.

After Aris died in 1938, his widow became entitled to remain on under s. 12, sub-s. 1 (*g*), of the Rent Restriction Act of 1920 as what is called the "shadow" of a statutory tenant, and she remained there by virtue of the statute until her death in 1950. But when the widow died all statutory rights came to an end. The defendant, although she had been living there for fifty years, got no statutory right.

It so happened, however, that after the mother died in 1950 the landlords let the defendant stay on for six months. She paid rent and the landlords accepted it; but they refused to change the rent book into her name, and they refused to let her have the tenancy. What is the result of that?

According to the common law as it stood before the Rent Restriction Acts, when the defendant stayed on with the consent of the landlords, she would become a tenant at will; and when she afterwards paid a weekly rent which was accepted by them, she would become a weekly tenant. That would be the result at common law, notwithstanding the refusal of the landlords to change the rent book into her name. Starting from that position, Mrs. Frazer, in her able argument, contended that, inasmuch as the defendant would at common law be a tenant at a rack rent, she is entitled to the protection of the Rent Restriction Acts; and she cited *Buck* v. *Howarth* (10) and *Chamberlain* v. *Farr* (11) in support of her contentions.

In my opinion, however, it is not correct to consider the common law position separately from the new position created by the Rent Restriction Acts. It must be remembered that when the mother died the defendant might well be thought to have a statutory right to remain. Suppose that the father at his death in 1938 had been a contractual tenant, and that the mother at her death in 1950 had been a statutory tenant: the defendant would have been entitled to remain in occupation under s. 12, sub-s. 1 (*g*), of the Act of 1920. That, indeed, was the contention put forward by her solicitors as soon as they were instructed on her behalf, and they have sought to maintain it in the courts. It is true they have not succeeded, but it was an arguable point. This removes the case from the old common law altogether.

It must be remembered that at common law the landlords would have had a clear, indisputable right to turn the defendant out; and, even if they did allow her to stay on and accepted rent from her, the consequences would not be serious because the landlords could always get rid of her by giving her a week's notice to quit. In that state of affairs, it was very proper to infer a tenancy at will, or a weekly tenancy, as the case may be, from the acceptance of rent. But it is very different when the rights of the landlords are obscured by the Rent Restriction Acts. Seeing that the house was within the Acts, the landlords had no clear right to turn the defendant out. They could not have done so except by proving to the county court that she was not protected by the Acts. And the consequences of granting her a contractual tenancy would be very far-reaching, because she would then be clothed with the valuable status of irremovability conferred by the Rent Restriction Acts.

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(10) [1947] 1 All E. R. 342.

(11) (1942) 112 L. J. (K. B.) 206.

In these circumstances, it is no longer proper for the courts to infer a tenancy at will, or a weekly tenancy, as they would previously have done from the mere acceptance of rent. They should only infer a new tenancy when the facts truly warrant it. The test to be applied in Rent Restriction Acts cases is the same test as that laid down by Lord Mansfield in cases of holding over: "The question therefore is, quo animo the rent was received, "and what the real intention of both parties was?": see *Doe* v. *Batten* (12), followed by this court very recently in *Clarke* v. *Grant* (13). If the acceptance of rent can be explained on some other footing than that a contractual tenancy existed, as, for instance, by reason of an existing or possible statutory right to remain, then a new tenancy should not be inferred.

It may well be asked: if the defendant was not a tenant, what was she? She was, I think, a licensee in this sense, that she did not acquire any interest in the land. That is the sense in which the word "licensee" has often been used of late. It is used to denote a permissive occupation falling short of a tenancy. For instance, when a requisitioning authority allows a person to occupy a house at a rent, the occupant is said to be a licensee because he has no interest in the land: see *Minister of Health* v. *Bellotti* (14); *Southgate Borough Council* v. *Watson* (15). And where a tenant was allowed to occupy a house rent free for the rest of his days, he was held to be a licensee: *Foster* v. *Robinson* (16). So also in cases like the present, I think, it may be

(12) (1775) 1 Cowp. 243, 245.
(13) [1950] 1 K. B. 104.
(14) [1944] K. B. 298.
(15) [1944] K. B. 541.
(16) [1951] 1 K. B. 149.

quite proper to call the occupant a " licensee " even though a sum is paid for use and occupation and even though the sum is called rent. The real reason for using the word " licensee " is to denote the fact that the occupant has no legal interest in the land, but only a permissive occupation short of a tenancy.

Nothing that I have said must be taken to apply to new occupants let in by a landlord. I confine myself to a person who is in the house and who has some colourable ground for saying that he or she is protected by the Rent Acts. In such cases, I think, the landlord can give such a person permission to occupy and can receive a weekly payment from him without necessarily creating a tenancy; but the longer it goes on, the more likely it is that the court will infer that a new tenancy has been in fact created.

In this case there was ample evidence to justify the court in refusing to infer a tenancy in the defendant. The landlords expressly refused to put her name on the rent book, and she knew it. I think that the judge was right in saying that she had merely a permissive occupation to which did not attach any statutory rights under the Rent Acts.

I therefore agree that the appeal should be dismissed.

ROXBURGH, J. I agree. Generally speaking, when a person, having a sufficient estate in land, lets another into exclusive possession, a tenancy results, and there is no question of a licence. But the inference of a tenancy is not necessarily to be drawn where a person succeeds on a death to occupation of rent-controlled premises and a landlord accepts some rent while he or the occupant, or both of them, is or are considering his or their position. If this is all that happened in this case, then no tenancy would result. How the interest of the occupant ought, in those circumstances, to be described I do not know. It would, I think, be a pity to call it a " licence ", because that word has, in connexion with landlord and tenant, already been appropriated to quite different situations. It must, I think, be left to jurists to invent a new name for what the Master of the Rolls has so aptly called " monstrum . . . informe . . .". But if, on the other hand, the landlords intended to let the defendant remain in occupation until they actually required the premises for their own employee, then I should have thought that a tenancy would result. However, it must always be a question of fact and degree.

The county court judge has found quite plainly as a fact that no new tenancy was created. I am not satisfied that he has misdirected himself in law by reason of his reference to the partly remembered decision of Cassels, J., in *Minister of Agriculture and Fisheries* v. *Matthews* (17). That was quite a different case. Presumably the grantor in that case had himself no estate or interest in the land; and, if that be so, he could not have created a tenancy. Here the landlords could quite easily create a tenancy, and the question is, as I think, whether they were merely leaving the defendant in occupation while they and she considered their respective positions or whether they agreed to leave her in occupation until they should actually require the premises for use for an employee. I think, on the whole, that that is the question to which the county court judge directed his mind, and that what he has really found is that the landlords intended the defendant to remain for the time being in occupation of the premises for a consideration but without becoming a tenant. Such a conclusion, which is one of fact, was in my view permissible in law in a Rent Restriction Act case, and it is one at which, as I think, he could properly arrive; but obviously the case was very near the line, and it would have been easy to reach a different conclusion.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co., for G. Stevenson & Son, Leicester; Sharpe, Pritchard & Co., for Hale & Mander, Coalville.*

B. A. B.

(17) [1950] 1 K. B. 148.

1951
April 27.

Lord Goddard, C.J., Croom-Johnson and Streatfeild, JJ.

Distinguished.
Reg. v. Notts Q. S., *ex parte* Harlow
[1952] 2 Q.B. 601

REX *v.* LONDON QUARTER SESSIONS.
Ex parte WESTMINSTER CORPORATION.

Local Government—Street trading—Registration of street trader by borough council—Cancellation of registration—Appeal by trader to magistrate—Reversal of cancellation—Whether borough council a "person aggrieved" by magistrate's order—No right of appeal to quarter sessions—London County Council (General Powers) Act, 1947 (11 *&* 12 *Geo.* 6, *c. xlvi*), *ss.* 25, 64.

A borough council whose cancellation of the registration of a street trader has been reversed by a magistrate on an appeal by the trader concerned under s. 25 of the London County Council (General

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Powers) Act, 1947, is not a "person aggrieved" by an order of a court of summary jurisdiction within the meaning of s. 64 of the Act, and consequently under the section has no right of appeal to quarter sessions from the decision of the magistrate.

APPLICATION for an order of mandamus.

The applicants, Westminster Corporation, acting under the powers conferred on them by the London County Council (General Powers) Act, 1947, registered certain persons as street traders and, at a later date, cancelled the registration in the case of five of the traders in question. Those traders, as permitted by s. 25 of the Act, appealed to the metropolitan police magistrate sitting at Bow Street, who reversed the cancellations ordered by the corporation.

The corporation thereupon sought to appeal to London quarter sessions against the order of the magistrate, claiming that they were persons aggrieved by an order of a court of summary jurisdiction within the meaning of s. 64 of the Act and were therefore entitled to appeal to quarter sessions against the decision of the magistrate. Quarter sessions held that no right of appeal was given to a borough council by s. 64, and the corporation thereupon applied for an order of mandamus to quarter sessions to hear their appeal.

Sir Godfrey Russell Vick, *K.C.*, and *Vernon Gattie* for the corporation. Quarter sessions were wrong in holding that they had no jurisdiction to entertain the appeal. The corporation have a public administrative duty to perform in the regulation of the streets; and, having been interfered with in the execution of that duty by the decision of the magistrate, they are persons aggrieved by his order within the meaning of s. 64 of the Act. It is submitted that Parliament intended that the words "persons "aggrieved" in the section should be read in their widest sense, and that they would clearly include persons who were frustrated in the performance of a public duty. The corporation desire the decision of the court on the question whether the magistrate's order in the present case is final. If it were so held, the result would be that the management of the streets in the metropolis would be left in the hands of the stipendiary magistrates.

Curtis-Bennett, *K.C.*, and *James Burge*, for quarter sessions, were not called on to argue.

LORD GODDARD, C.J. Street traders have to be licensed, and the powers of the council are to be found in the London County

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REX v. LONDON QUARTER SESSIONS. *Ex parte* WESTMINSTER CORPORATION.

Lord Goddard, C.J.

Council (General Powers) Act, 1947, under which the council can give and can revoke licences to street traders. By s. 25 of that Act, it is provided: " Any person aggrieved by the refusal of a " borough council to register him as a registered street trader or " to grant or renew an annual licence or by the cancellation by a " borough council of his registration as a registered street trader " or by the revocation or variation by a borough council of an " annual licence or by any prescription made by a borough council " under sub-s. 5 of s. 21 (Annual licences) of this Act may appeal " to a petty sessional court and on any such appeal the court may " confirm reverse or vary the decision of the borough council and " may award costs ". By s. 64, it is provided: " Any person " deeming himself aggrieved by any conviction or order by a " court of summary jurisdiction under any provision of this Act " may appeal to the next practicable court of quarter sessions " under and according to the provisions of the Summary Jurisdiction Acts ".

It has been said in this court in *Fulham Borough Council* v. *Santilli* (1) and *Stepney Borough Council* v. *Joffe* (2), that the widest possible powers are given to the magistrate or the court of summary jurisdiction before whom the appeal is brought, and that the appeal lies to that court not only on law but on fact; in other words, the petty sessional court is substituted for the borough council, and can make any order which seems right to the court on an appeal being brought.

In the present case, the corporation, having cancelled the registration of several street traders, they appealed, and the magistrate reversed the cancellation. The question which arises is whether the corporation have any right of appeal under s. 64 of the Act of 1947. I adhere to the opinion which I expressed in *Stepney Borough Council* v. *Joffe* (3), where I said, although I did not actually decide it: " It is, perhaps, not without " importance to notice that by s. 64 of the Act from the magistrate's decision a further appeal is given to quarter sessions, " which would certainly enable the trader, though not, I think, " the borough council, to appeal ".

In my opinion, a borough council are not given an appeal by s. 64, and I think for several reasons. In the first place, as Streatfeild, J., has pointed out during the argument, wherever a borough council are mentioned in this Act they are always mentioned as the borough council, and a person who may be affected by their orders and so forth is referred to as a " person ", and the appeal which is given by s. 64 is given to " any person " deeming himself aggrieved ". In view of the structure of the Act and of the expressions used in the earlier sections, if it was intended to give a borough council an appeal, I should have expected that the section would have said: " Any person or any " borough council deeming themselves aggrieved ". Further, I do not think that it can be said that because the borough council's decision, be it administrative or whatever it may be, has been reversed by the magistrate, that that makes the borough council a person aggrieved for the purpose of this section. It is not, " any person affected by the order ", but " any person aggrieved " by the order " who is given an appeal. I am willing to assume for the purpose of this case that the magistrate's decision reversing the decision of the corporation should be regarded as an order. I do not feel absolutely convinced of it, but I will assume that it is so, because the actual decision which has been shown and read to us says: " It is ordered that the decision be reversed ".

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(1) [1933] 2 K. B. 357.

(2) [1949] 1 K. B. 599; 47 L. G. R. 189.

(3) 47 L. G. R. 192.

The best description or definition of the expression " aggrieved " is to be found in the well-known case of *Ex parte Sidebotham* (4), where James, L.J., said: " But the words " ' person aggrieved ' do not really mean a man who is disappointed of a benefit which he might have received if some " other order had been made. A ' person aggrieved ' must be a " man who has suffered a legal grievance, a man against whom " a decision has been pronounced which has wrongfully deprived " him of something, or wrongfully refused him something, or " wrongfully affected his title to something ". It cannot be said that the corporation in the present case, whose decision has been reversed, come within those words.

Another case which has some, though no very direct, bearing on the matter, is *Reg.* v. *Keepers of the Peace and Justices of the County of London* (5), where the question was raised whether the prosecutor in a quasi-criminal case, a matter affecting a highway, was a person aggrieved, and the court held that a prosecutor was never a person aggrieved. It was put that he might be annoyed at finding what he thought was a breach of the law was not a breach of the law. The court went on to say: " The section " does not give an appeal to anybody but a person who is by the " direct act of the magistrate ' aggrieved '—that is, who has had

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(4) (1880) 14 Ch. D. 458, 465.

(5) (1890) 25 Q. B. D. 357.

"something done or determined against him by the magistrate". In this case, as I have already said, what the statute does, according to the decisions to which I have referred, is to substitute the opinion of the magistrate for the opinion of a borough council. The court of summary jurisdiction has to take into account the same matters as the borough council had to take into account, and if the court thinks that the cancellation of the licence is not justified, it can restore the licence to the street trader. If the court of summary jurisdiction refuses to grant a licence, then the street trader is a person aggrieved, because his livelihood is affected, or an order is made directly affecting him. In my opinion, the order made here did not directly affect the borough council in such a way as to make them a "person "aggrieved" within the meaning of the section.

For these reasons, I think that the sessions were right in holding that no appeal was given by s. 64 to the borough council, and that consequently this application for an order of mandamus should be refused.

CROOM-JOHNSON, J. I am of the same opinion. The jurisdiction conferred on a borough council in this matter is to act as a tribunal in connexion with the granting or suspending or restoring of the licences of street traders. From their decision there is a right of appeal under s. 25 by a person whose livelihood has been interfered with, and who is aggrieved by the order which the borough council have made. It has been argued in this case that if the right of appeal is exercised, and the matter comes before a substituted tribunal, which is the court of summary jurisdiction, and that court comes to a different conclusion, that gives the original tribunal, namely, the borough council, a right of appeal under s. 64 of the Act, because they become aggrieved by reason of their order having been varied or set aside. Speaking for myself, I should want very plain language, and very cogent arguments, before I should be disposed to say that the tribunal, whose order has been set aside, thereupon become persons aggrieved so that they can appeal against the order of the notional court of appeal which has set aside their order. To establish that, Sir Godfrey Russell-Vick had to rely on s. 64 of the Act, under which any person who is "aggrieved by any conviction or order by a court of summary "jurisdiction under any provision of this Act may appeal to the "next practicable court of quarter sessions". The question whether there is an order is one of the essential things which

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must exist before a person can allege that he is aggrieved. I share my Lord's doubts whether in this case there ever was an order which comes within s. 64, although the form of the decision as drawn up apparently uses the word "order".

I may add that I think that the point raised by Streatfeild, J., during the arguments regarding the distinction which is drawn in the sections between "the borough council" and "a person "aggrieved" is well nigh decisive of the whole matter.

In my opinion quarter sessions came to a right decision.

STREATFEILD, J. I agree.

Application refused.

Solicitors: *Allen & Son; Kingsley, Napley & Co.*

P. B. D.

REX *v.* LUMSDEN.

C. C. A.

1951
May 7.

Cassels, Byrne and Streatfeild, JJ.

Criminal Law—"Being found by night in a building"—Meaning of "found in"—Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 28, *sub-s.* 4.

By s. 28, para. 4 of the Larceny Act, 1916, "Every person who "shall be found by night . . . in any building with intent to "commit any felony therein; shall be guilty of a misdemeanor. . . ."

The language of that sub-section must be given its ordinary meaning. Therefore, an accused person cannot be said to have been "found in" a building when there was no evidence that he had actually been seen in the building, even though it might reasonably be inferred from the facts proved in evidence that he had been inside the building.

APPEAL against conviction.

The appellant, Robert James Lumsden, was convicted at London Quarter Sessions, under s. 28, para. 4, of the Larceny Act, 1916, on a charge of being found by night in a building with intent to steal. On January 11, 1951, at about midnight, he was seen by two police officers to cross the New Kent Road and go up an alley in which there was a recess leading to a doorway into a cinematograph theatre. Shortly afterwards a shaft of light became visible which came from the doorway. The officers found the door open, and one of them entered the theatre and went upstairs. The theatre was in darkness and the officer could not find the appellant. The officers returned to their original post of observation, and a few minutes later they saw the appellant run out of the recess into which he had originally disappeared. They gave chase and apprehended him some two hundred yards down the road. Both the officers agreed that they did not at any time see the appellant in the theatre.

On a submission that there was no case to answer, the deputy chairman held that, although there was no evidence that the appellant was seen in the theatre, the jury were entitled to infer the fact from the circumstances (1.) that he was seen to disappear into the recess; (2.) that the officers could not find him in the doorway; (3.) that the officer who went upstairs could not see him as the theatre was in darkness; and (4.) that he was seen to run out of the recess a few minutes later.

The jury convicted the appellant, and he was sentenced to six months' imprisonment. He appealed against his conviction on the ground that he had not been " found in " a building within the meaning of s. 28, para. 4, of the Larceny Act, 1916.

Stephen Stewart for the appellant. The appellant was wrongly convicted since he was not " found . . . in any building " within the meaning of s. 28, para. 4, of the Larceny Act, 1916. The material words " found in " appear in various statutes, including the Vagrancy Act, 1824, the Prevention of Crimes Act, 1871, and the Licensing Acts. There are three possible interpretations of the meaning of the words " found in ". They may mean (1.) " apprehended in "; (2.) " seen or discovered in "; or (3.) " proved to have been in ". The first suggested meaning was rejected and the second approved in *Rex* v. *Goodwin* (1). The third suggested meaning, " proved to have been in ", has never been approved, and it is only if that meaning is correct that the prosecution can succeed in the present case. If, as is submitted, the correct interpretation of " found in " is " seen or discovered " in ", there is no reason for an inference to be drawn by a jury in the present case that the appellant was " in " the building, however irresistible that inference may seem to be. [He also referred to *Moran* v. *Jones* (2) and *Rex* v. *Parkin* (3).]

J. N. Hutchinson for the prosecution. The appellant was rightly convicted. The jury were entitled to take into consideration all the relevant circumstances; and, taking a common-sense view of those circumstances, the only possible conclusion at

(1) (1944) 60 T. L. R. 324.
(2) (1911) 75 J. P. 411.
(3) [1950] 1 K. B. 155.

which they could arrive was that the appellant must have been in the theatre from the time when he disappeared into the recess until he was seen running out of that recess a few minutes later.

CASSELS, J., stated the facts and continued:—This case calls for consideration, as a matter of law, of the true meaning of s. 28, para. 4, of the Larceny Act, 1916, which provides that "Every "person who shall be found by night . . . in any building with "intent to commit any felony therein; shall be guilty of a mis-"demeanor". There is no question about the night in the present case; the two important words are "found in". Three propositions as to the meaning of those words have been put forward on behalf of the appellant: (1.) that the word "found" means apprehended in; or (2.) that "found" means seen in; or (3.) that it means proved to have been in the premises.

This court has already considered this particular section of the Larceny Act in *Rex* v. *Parkin* (4). In that case the appellant was seen half-way up some piping at the side of the building with his foot on the junction of the pipe and his head and shoulders near the window. The police officer could not see clearly, but it appeared to him that the appellant had one of his hands through the window for the purpose of pulling himself into the building. It was held that the language of the section must be given its ordinary meaning and that, as the appellant had been found, not in the building, but outside, trying to get into it, he was not guilty of an offence under this particular section.

Applying the principle laid down there to the present case, there was no evidence fit for the consideration of the jury that the appellant was "found in" the building. There might be evidence from which it would be reasonable to infer that he must have been in it if he was seen coming out, but that is not the proper interpretation of the statute. If "found in" means what it says, it does not necessarily mean that the accused man must be caught in or apprehended in a building, or that the finder should also be in the building as well as the person who is charged, but it does mean, and can only be taken to mean, that if a person is to be convicted of an offence against this section there must be clear and unmistakable evidence that he has been, as the section says, "found in" the building. There was no such evidence in this case. The evidence could have been reasonably interpreted as showing that the appellant had been inside the

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(4) [1950] 1 K. B. 155.

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building but there was no evidence from either police officer that he had been seen in the building. He had certainly been seen at the doorway, but there was no evidence that he was "found in" the building.

In those circumstances the court has come to the conclusion that this conviction must be quashed, and the appellant must be set free.

Appeal allowed.

Solicitors: *Hawker & Wheatley; The Solicitor, Metropolitan Police.*

P. B. D.

1951
April 27.

Lord Goddard, C.J., Croom-Johnson and Streatfeild, JJ.

WILTSHIRE COUNTY COUNCIL v. WILTSHIRE QUARTER SESSIONS STANDING JOINT COMMITTEE.

Police—County council—Compulsory acquisition of land for police station—Duties of county council—Local Government Act, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 30—*Police Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 46), *s.* 15.

Where, acting under s. 30 of the Local Government Act, 1888, the standing joint committee of quarter sessions of a county request the county council to acquire a particular piece of land for police purposes, the fact that the site selected cannot be acquired by the county council without the exercise of the compulsory powers to purchase conferred on them by s. 15 of the Police Act, 1946, does not give the council a general discretion to refuse the request of the standing joint committee for the acquisition of the land; nor have the county council any discretion to refuse to acquire compulsorily on the ground that they are reasonably satisfied that other and equally suitable sites are available for the police purposes in question.

Ex parte Somerset County Council (1889) 58 L. J. (Q. B.) 513 followed.

Special case stated under s. 29 of the Local Government Act, 1888.

Certain questions having arisen between Wiltshire County Council and the Standing Joint Committee of the Wiltshire Quarter Sessions, friendly proceedings were instituted between the parties for the purpose of obtaining the decision of the court as to the respective powers and duties of the parties in the following circumstances:—

By s. 15 of the Police Act, 1946 (as amended by s. 4 of the Acquisition of Land (Authorization Procedure) Act, 1946), the county council of any county may be authorized by the Minister of Health to purchase compulsorily any land which is required for the purpose of any of the functions of the police authority for the county.

On June 8, 1950, at a meeting of the standing joint committee, a resolution was passed to the effect that efforts had been made to find a site for the erection of a new police station at Chippenham and that a certain site had been approved in respect of which the county council should be asked to exercise their compulsory powers of acquisition. The county council were of opinion that other equally suitable sites were available, and resolved that the question of the relative functions of the standing joint committee and the county council with reference to the compulsory acquisition of land should be submitted to the court for decision.

The specific questions submitted for decision were: (1.) "Has the county council any general discretion to refuse "to acquire compulsorily for police purposes a particular piece "of land which the standing joint committee had requested them "so to acquire?" and (2.) "If the answer to question (1.) is in "the negative, has the county council any discretion to refuse to "acquire compulsorily for police purposes a particular piece of "land which the standing joint committee has requested them "so to acquire if they are reasonably satisfied that other and "equally suitable sites are available for the police purposes in "question?".

Capewell, K.C., and *Squibb* for the standing joint committee. The two questions raised by the case were determined in favour of the standing joint committee by the decision in *Ex parte Somerset County Council* (1), where, in answer to questions submitted to the court, it was held that all questions as to the maintenance, repair, alteration or improvement of buildings for the use of the police were to be determined by the standing joint committee and that the county council had no power to place their veto on the requirements of the committee. The decision in that case has been followed ever since 1889, and it is a clear authority for answering the questions submitted in the present case in the negative.

(1) (1889) 58 L. J. (Q. B.) 513.

Percy Lamb, K.C., and *Widgery* for the county council. It is conceded that if the site suggested in the present case could have been acquired by agreement, the county council would have been bound to purchase it if required to do so by the standing joint committee. The position is, however, different when powers of compulsory purchase are involved, because any authority acquiring compulsorily is bound to exercise a discretion and to satisfy itself that the appropriate land is not available without the exercise of compulsory powers. The county council cannot be released from their duty to consider those matters merely because the standing joint committee require them to purchase a particular site. Although it is the duty of the joint committee to determine whether a particular building is necessary, it is still open to the county council to say which particular site shall be chosen.

Lord Goddard, C.J. We have had an opportunity during the adjournment, of giving this matter consideration, and I will therefore deliver the judgment of the court now. In our opinion the answer to both the questions which we have been asked must be in the negative. We are bound by the decision of this court in *Ex parte Somerset County Council* (2), which decides that the county council are obliged, on the request of the standing joint committee, to acquire a piece of land which is required for police purposes, and obviously the acquisition of land for a police station is an acquisition for such purposes.

I do not propose to go through all the relevant sections to which our attention was called because they were fully considered in the case to which I have referred, which, as I have said, in our opinion is binding on us. The only further matter to which I need refer, and it is the gist of the matter which has been submitted to us, is that in this particular case the standing joint committee have determined that it is necessary for their purposes that a property should be acquired in the borough of Chippenham which, apparently, the owner is not willing to sell, and it may be that compulsory powers of purchase will have to be applied.

Section 15 of the Police Act, 1946, provides that " the council " of any county or county borough being a separate police area may " be authorized, by means of an order made by the council and " confirmed by the Minister of Health, to purchase compulsorily " any land, whether situated within or without the county or

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(2) 58 L. J. (Q. B.) 513.

"borough, which is required for the purpose of any of the functions of the police authority of the county or borough". Under the earlier Acts which were concerned with this matter it is clear that compulsory powers could be exercised, because in s. 65 of the Local Government Act, 1888, which is now repealed and has been replaced by s. 15 of the Police Act, 1946, there is a reference to compulsory powers being exercised by the county council.

Mr. Lamb, in an interesting argument on the various sections and their history, while admitting that the county council would have to buy the land or buildings required by the standing joint committee for a police station if they could be obtained from a willing seller, submitted that they were not bound to acquire them if to do so involved the exercise of their compulsory powers. In the opinion of the court the matter must be looked at in this way: The standing joint committee have the right under the statutes as interpreted in *Ex parte Somerset County Council* (3) to require the county council to buy. It is no answer, therefore, for the county council to say that they cannot buy, if they have compulsory powers in reserve, because the answer would be that if they could not buy by agreement they could do so by compulsion, and the standing joint committee can request and require them to acquire the land or buildings which they want.

It is true that under s. 15 of the Police Act, 1946, the consent of the Minister of Health is necessary to a compulsory purchase by the council. That only means that the county council must apply to the Minister for his permission to exercise their compulsory powers. If he prohibits the purchase, another state of affairs would arise, since the Minister's refusal would override the decision of the county council and the standing joint committee.

In our opinion the mere fact that compulsory powers may have to be exercised is not, in any way, an answer to the requirement of the standing joint committee that the county council should acquire the site in the present instance. For these reasons we answer the questions submitted to us in the case in the negative.

Questions answered in the negative.

Solicitors (for both parties): *Collyer-Bristow & Co., for P. A. Selborne Stringer, Trowbridge.*

P. B. D.

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(3) 58 L. J. (Q. B.) 513.

1951
Apr. 19.

Lord Goddard, C.J., Oliver and Cassels, JJ.

VICTORIA MOTORS (SCARBOROUGH) LD. AND OTHERS v. WURZAL.

Road Traffic—Stage carriage—" Special occasion "—Road service licence —Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61, *sub-s.* 2—*Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 25, *sub-s.* 1.

To constitute a special occasion for the carriage of a private party within the meaning of s. 25, sub-s. 1, of the Road Traffic Act, 1934, which will exempt the owner of a stage carriage from the necessity of holding a road service licence in respect of a particular journey by the vehicle, it is not sufficient that all the conditions specified in the sub-section should be satisfied: in addition, the occasion itself must be a special occasion as opposed to a general one.

Opinion of Devlin, J., in *Reynolds* v. *G. H. Austin & Sons Ld.*, ante 135, 152–153, approved and applied.

CASE STATED by Scarborough justices.

Informations were preferred against the defendants, Victoria Motors (Scarborough) Ld., and Scarborough Holiday Chalets Ld., charging them with contraventions of, among other things, s. 72 of the Road Traffic Act, 1930. In the case of the first defendants it was alleged that on August 19, 1950, they permitted the use on the road of a motor vehicle as a stage carriage within the meaning of the Road Traffic Acts, 1930 to 1934, otherwise than under a road service licence granted pursuant to the section. The second defendants were charged with unlawfully using the vehicle on the occasion in question. Neither of the defendants held a road service vehicle licence in respect of the vehicle.

The following facts were proved or admitted:—The second defendants owned and managed a holiday camp where they accommodated approximately 300 visitors who normally booked from week to week. Owing to lack of transport facilities for taking visitors away on Saturday mornings, the second defendants made arrangements with the first defendants to supply coaches to take visitors to the railway station.

Between June 3 and August 19, 1950, the first defendants supplied coaches as required and charged the second defendants on the basis of 9*d.* for each seat booked and occupied, which amount was in turn charged to the residents of the camp using the coach. No persons other than resident visitors travelled on the coaches, and intending travellers booked at the camp office and secured a ticket which was later handed to the driver of the coach.

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VICTORIA MOTORS (SCARBOROUGH) LD. *v.* WURZAL.

On the day in question a coach, driven by an employee of the first defendants, was conveying camp visitors to the railway station. The driver duly produced his work ticket to the police officer and handed to him one of the tickets which had been collected from a passenger. The method by which the passengers at the camp were assembled was by an announcement made by a loud speaker of the arrangements made for their carriage to the station and, except in that way, the arrangements were not announced or advertised. The visitors formed parties to travel to the station, and on paying 9*d.* each was given a ticket entitling him to a seat in the coach.

It was contended for the defendants that, as all the conditions contained in s. 25, sub-s. 1, of the Road Traffic Act, 1934, had been complied with, the vehicle must be deemed to have been used on a special occasion for the conveyance of a private party, and that the passengers in the coach formed a private party. It was further contended that a "special occasion" was defined by s. 25, sub-s. 1, of the Act of 1934, and not in accordance with any narrower definition applied before the passing of that section, and that in any event the coach was not being used as a stage carriage or in any manner such as to require a road service licence.

It was contended for the prosecution that condition (*a*) prescribed by s. 25, sub-s. 1, had not been complied with, though the remaining conditions had, and that the vehicle was not being used on a special occasion in that the journey was one of a series of journeys regularly undertaken on Saturdays.

The justices held that the occasion was not a special occasion and that the persons carried in the vehicle did not constitute a private party. They accordingly convicted and fined the defendants, who now appealed.

Van Oss for the defendants. The substantial question raised by the case is whether the occasion in respect of which the defendants were charged was a special occasion on which a private party was being carried within the meaning of s. 25, sub-s. 1, of the Road Traffic Act, 1934. It is submitted that it was such an occasion, but the justices held that there was a wider consideration to be applied beyond the mere words of the section. Section 25, sub-s. 1, provides " that a vehicle shall be deemed to " be used on a special occasion for the conveyance of a private " party where it is used on a journey in relation to which the " following conditions are satisfied, and not otherwise ". Then follow seven conditions, and it is contended that the section contains a clear definition of what constitutes a special occasion which does not allow the court to speculate as to the meaning of the phrase. It was agreed that all the conditions imposed by the section except the first, which is concerned with the arrangements for the bringing together of the passengers who were to make the journey, were fulfilled, and it is submitted that there was evidence on which it should have been held that that condition, too, was satisfied. That being so, the journey to the station was a special occasion and no road service licence was necessary for the stage carriage in which it was made. The fact that the journey in question was one of a series of journeys regularly undertaken on Saturdays does not prevent it being a special occasion.

J. P. Ashworth for the prosecution. The decision of the justices was right. Before any question of the exemption of a stage carriage from the necessity of holding a road service licence arises there must exist an occasion which can properly be described as a " special occasion ". Section 25, sub-s. 1, is not to be read as if it said that a special occasion shall be one in regard to which the specified conditions exist. It must be a special occasion which, in addition, satisfies all the conditions laid down in the section. Here there was no such occasion, as the regular carriage of passengers from the camp to the railway station was essentially a general rather than a special occasion.

That the construction put on the section by the prosecution is right is supported by the observations of Devlin, J., in *Reynolds* v. *G. H. Austin & Sons Ld.* (1). If the argument for the defendants that the conditions contained in s. 25 for constituting a special occasion are definitive and exhaustive is correct, there was ample evidence on which the justices could find that condition (*a*) had not been fulfilled.

Van Oss replied.

LORD GODDARD, C.J., referred to the facts and continued:—Mr. Van Oss has contended that the use of a motor vehicle without a road service licence in the circumstances of this case is permitted by s. 25, sub-s. 1, of the Road Traffic Act, 1934. Before looking at that section, however, we have to consider s. 61 of the Road Traffic Act, 1930. That section divides public service vehicles into the following classes: " Stage carriages; that is to " say, motor vehicles carrying passengers for hire or reward at

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(1) Ante, 135, 152–153.

"separate fares (any or all of which are less than one shilling "for a single journey or such greater sum as may be prescribed), "stage by stage, and stopping to pick up or set down passengers "along the line of route, and any other motor vehicles carrying "passengers for hire or reward at separate fares and not being "express carriages as hereinafter defined".

As an express carriage is one which carries people at separate fares of not less than a shilling, the vehicle in the present case was not an express carriage but, since it carried persons for hire or reward at separate fares of less than one shilling, it was, if anything, a stage carriage. There is then a proviso which I do not think can be altogether overlooked: "Provided that a motor "vehicle adapted to carry less than eight passengers", that is to say, an ordinary motor car, "shall not be deemed to be a stage "carriage or an express carriage by reason only that on occasions "of race meetings, public gatherings and other like special "occasions it is used to carry passengers at separate fares". In other words, it would allow a taxi-cab to stand at a railway station near to a racecourse and take people up at so much a head.

Section 61, sub-s. 2, provides: "It is hereby declared that "where persons are carried in a motor vehicle for any journey "in consideration of separate payments made by them, whether "to the owner of the vehicle or to any other person, the vehicle "in which they are carried shall be deemed to be a vehicle "carrying passengers for hire or reward at separate fares, whether "the payments are solely in respect of the journey or not". That would, of course, cover the case of a motor coach for which the fare included not only the journey to an exhibition but entrance to the exhibition. Then: "Provided that a vehicle used "on a special occasion for the conveyance of a private party "shall not be deemed to be a vehicle carrying passengers for hire "or reward at separate fares by reason only that the members "of the party have made separate payments which cover their "conveyance by that vehicle on that occasion". Under that provision, if a vehicle is used on a special occasion, it need not necessarily have a stage carriage licence or a particular form of road traffic licence, but it must be used on a special occasion. Some light on what the legislature meant by a special occasion is afforded by the previous proviso, which is concerned with vehicles of the nature of private vehicles or taxi-cabs, and which mentions "race meetings, public gatherings, and other like "special occasions". I do not say that the list is exhaustive because there could well be other special occasions such as going for a day's excursion, a Sunday school party or a Mothers' Union party, or a party of people going to a dance or a football match, or something of that kind.

Difficulties arose under the Act of 1930, and the legislature thought fit to impose certain conditions with regard to special occasions. Consequently, by s. 25, sub-s. 1, of the Road Traffic Act, 1934, it is provided: "For the purposes of the proviso to "sub-s. 2 of s. 61 of the principal Act, a vehicle shall be deemed "to be used on a special occasion for the conveyance of a private "party where it is used on a journey in relation to which the "following conditions are satisfied, and not otherwise (that is to "say): ". The first condition (*a*) concerns the arrangements for bringing together the passengers for the purpose of making the journey and who may make those arrangements. The sub-section continues: "(*b*) The journey must be made without previous "advertisement to the public of the arrangements therefor; "(*c*) all the passengers must, in the case of a journey to a "particular destination, be carried to, or to the vicinity of, that "destination, or, in the case of a tour, be carried for the greater "part of the journey; (*d*) no differentiation of fares for the "journey on the basis of distance or of time must be made; "(*e*) in the case of a journey to a particular destination the "passengers must not include any person who frequently, or as a "matter of routine, travels, at or about the time of day at which "the journey is made, to that destination from a place from or "through which the journey is made". In other words, a regular passenger who is going home from his work or going to lunch must not join the private party and pay as though he was a member of that party, because he must use the ordinary omnibus. There are two other conditions concerning the obligations of drivers to which I need not refer.

The argument of Mr. Van Oss, which requires attention, is that s. 25, sub-s. 1, is definitive, with the result that if all the provisions to which I have referred are fulfilled, then, whatever the purpose of the journey, or whatever may be the occasion of the journey, the journey becomes a special occasion for the conveyance of a private party. If he is right in that, there would seem to be a considerable lacuna in the Act, because it would enable a hotel or a club, or a similar institution, to run a private omnibus service of its own; but I do not think that the construction for which Mr. Van Oss contends is the true one. I think that the true construction is that the sections of the two Acts to which I have referred must be read together and that not only must the occasion be a special occasion, but it must also comply with the conditions that are laid down in s. 25, sub-s. 1, of the Act of 1934.

A coach running on a particular occasion from a village or a hotel to a football match might well be a vehicle used on a special occasion, and if a party of friends got together for the purpose of attending the match, it would be a private party on a special occasion, but that would not justify a vehicle being used without holding the appropriate licence, unless, in addition, the conditions laid down in s. 25, sub-s. 1, were observed. If any one of those conditions were not observed, then, although it might be a special occasion, an offence would be committed. I do not think, however, that it follows that because the conditions are observed there is a special occasion if in fact the occasion is one of the most general description. To take visitors from a holiday camp or a hotel to a railway station every Saturday seems to me to be the antithesis of a special occasion. It is a general occasion.

Mr. Van Oss argued that if the occasion is special it cannot become general, or, in other words, that the protection given to a special occasion cannot be taken away because the special occasion happens on a great number of occasions. That may be so, but it must be established that there is a special occasion, and I cannot think that it can ever have been contemplated by the legislature, or that it is a proper construction of the fasciculus of sections to which I have referred, that an omnibus service to and from the station, which is what the present case amounts to, can by any stretch of imagination be called a special occasion. It seems to me to be an occasion of the most ordinary description and not special in any sense of the word.

I am fortified in the opinion I have formed by the judgment of Devlin, J., in *Reynolds* v. *Austin* (2), where, although it may possibly be said that the view which he expressed on the point was obiter—since the other two members of the court, Humphreys, J., and myself, did not refer to it—Devlin, J., clearly showed that in his opinion the construction I am putting on this section is the right one, namely, that the legislature has said that the privilege given by s. 25, sub-s. 1, shall not attach unless certain conditions have been fulfilled. Although an occasion may be a special occasion, it is not to be a special occasion which will exempt a vehicle from the necessity of having a licence, unless

(2) Ante, 135, 152–153.

the occasion is attended by the fulfilment of the other prescribed conditions.

One other point was urged by Mr. Van Oss: the charge preferred against the second defendants under s. 72 was that they "did unlawfully use the said vehicle as a stage carriage "within the meaning of the Road Traffic Acts, 1930 to 1934 . . . "otherwise than under a road service licence". Mr. Van Oss argued that there was no evidence that the second defendants "used" the vehicle. Quite apart from the fact that they made arrangements for their guests to be taken to the station, at least they were aiding and abetting the use of the vehicle. They called on the first defendants to provide the vehicle and they arranged the party and collected the money. In those circumstances it seems to me quite plain that if the second defendants were not principals, they were aiders and abettors and under the Summary Jurisdiction Act an abettor can be charged as a principal. There is nothing therefore in that point.

For the reasons I have given, I think that in a somewhat difficult case the justices came to a right decision and that the appeal, therefore, must be dismissed.

OLIVER, J. I agree. I was very much impressed by the argument of Mr. Van Oss based on the language of s. 25, sub-s. 1, of the Road Traffic Act, 1934. I can see the force of the argument that the section is definitive in its terms, but on the whole I have come to the conclusion that the views expressed by Devlin, J., in *Reynolds* v. *Austin* (3) are right, and I agree with the judgment which has been delivered.

CASSELS, J. I agree.

Appeal dismissed.

Solicitors: *Jaques & Co., for Whitfield, Bell and Smith, Scarborough; Treasury Solicitor.*

P. B. D.

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(3) Ante, 135, 152–153.

HIGHAM *v.* HAVANT AND WATERLOO URBAN DISTRICT COUNCIL.

Affirmed
[1951] 2 K. B. 527

C. A.

1951
June 4, 5.

Cohen, Singleton and Morris, L.JJ.

Town and Country Planning—Compulsory acquisition of land—Assessment of compensation by arbitrator—Use of land by claimant contrary to planning control—Liability of land to enforcement order—Liability to be taken into account by arbitrator—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 51, 55, 75.

When assessing compensation to which an owner of land is entitled under Part V of the Town and Country Planning Act, 1947, an official arbitrator acting under the Acquisition of Land (Assessment of Compensation) Act, 1919, ought to take into account the possibility of an enforcement notice being served on the owner of the land under s. 75 of the Act of 1947, although that section had not come into force at the date of the notice to treat.

Decision of the Divisional Court [1951] 1 K. B. 509 affirmed.

Appeal from Divisional Court (1).

The relevant enactments, the facts and issues raised in this case are fully set out in the report of the proceedings before the Divisional Court (1), and for the purpose of this report the following brief summary will suffice.

Under powers granted by a private Act the Havant and Waterloo Urban District Council proposed to acquire for the purpose of certain sea-defence works two plots of land, known as the Sealand site and the Creek Road site, in the parish of Havant, which were used by their owner, Mrs. Higham, as sites for caravans. The plots had been bought by her in various parcels before August, 1936. No town planning scheme had been made for the area in which the plots were situated, but in 1928 the Minister of Health had confirmed a resolution by the local planning authority to prepare a scheme. At the time when Mrs. Higham began to use her land for caravans there was in force a statutory general interim development order. In December, 1937, Mrs. Higham applied for a licence under s. 269 of the Public Health Act, 1936, to use the land for caravan sites, and that application, not having been refused within the time specified by the Act, was by virtue of sub-s. 4 of s. 269 deemed to have been granted unconditionally. After they had obtained power to acquire the land in 1947 the local authority served notices to treat on the owner in June, 1948. The compensation to which the owner of the land was entitled was assessable under Pt. V of the Town and Country Planning Act, 1947, by an official arbitrator acting under the Acquisition of Land (Assessment of Compensation) Act, 1919.

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(1) [1951] 1 K. B. 509.

The arbitrator made his award in the form of a special case, in which he submitted for the opinion of the High Court the following questions: (1.) whether on or after July 1, 1948, the actual use of the two pieces of land could be the subject of an enforcement notice under s. 75 of the Town and Country Planning Act, 1947, and, if so, whether the arbitrator might take that fact into account in assessing compensation; and (2.) whether a licence under s. 269 of the Public Health Act, 1936, was personal to the licensee. He assessed the compensation in varying amounts dependent on whether the first question was answered in the affirmative or the negative.

On December 14, 1950, the Divisional Court (Lord Goddard, C.J., Hilbery and Parker, JJ.) delivered a considered judgment, in which the first question was answered in the affirmative.

The claimant appealed.

Percy Lamb, K.C., and *Geoffrey Howard* for the claimant.

Harold Williams, K.C., and *W. L. Roots* for the urban district council.

Cohen, L.J. Having come to the conclusion on the first question that the proper answer was in the affirmative, that is to say, that the use of the pieces of land as a camping site was a proper subject of an enforcement notice and that the arbitrator must take that into account in assessing compensation, the Divisional Court did not find it necessary to determine the second question. Nor have we to do so, because, having regard to what was asked by the notice of appeal, Mr. Lamb and Mr. Howard, who appeared for the plaintiff, felt unable to argue that the licence was not a personal one.

That being so, the question we have to decide is whether or not the use of the two pieces of land could be the subject of an enforcement notice, and whether the arbitrator ought to take that into account in assessing compensation. The matter came before a Divisional Court composed of the Lord Chief Justice, Hilbery, J., and Parker, J. We find ourselves so completely in agreement with both the conclusions and reasoning of the Divisional Court as expressed in their judgment, delivered by Parker, J., that, while we appreciate the arguments which have been presented to us, we do not think it desirable to burden the

Law Reports with any further reasons of our own for rejecting them.

SINGLETON, L.J. I agree. In my view the judgment of the Divisional Court, delivered by Parker, J., covers the question which has been raised on this appeal. I agree with the reasoning of that judgment completely, and I do not wish to add anything to it.

MORRIS, L.J. I also find myself in full agreement with the conclusions and reasoning of the Divisional Court.

Appeal dismissed.

Solicitors: *Mortimer Silverman & Co., for James Barnes, Hayling Island; Lees & Co., for B. W. R. Gofton, Havant.*

A. W. G.

MURRAY AND ANOTHER *v.* HARRINGAY ARENA LD.

[1949 M. 4184.]

C. A.
1951
June 6, 7; 15.

Cohen, Singleton and Morris, L.JJ.

Negligence—Personal injuries—Ice-hockey match—Spectator, an infant, injured by rubber puck—Duty of promoters only to take due care to ensure safety—Risk incidental to game accepted by plaintiff.

A boy, six years of age, was taken by his father to see an ice-hockey match in the defendants' arena. Shortly after the match had begun, the puck, a rubber disc, three inches in diameter and one inch thick, with which the game was played, was knocked out of the ice rink and struck the boy over the left eye, causing injury which seriously impaired the sight of the eye. In an action brought on behalf of the boy for damages:—

Held, that there was no implied obligation on the defendants under the contract between the parties to protect the spectator against such dangers as might be incidental to the game, which any spectator could reasonably foresee, and of which he took the risk; and that the fact that the plaintiff was an infant would not justify the court in extending the duty which the law laid on the defendants, viz., to take due care to ensure spectators' safety.

Principle in *Hall* v. *Brooklands Auto Racing Club* [1933] 1 K. B. 205 applied.

Decision of Ormerod, J. [1951] W. N. 38 affirmed.

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APPEAL from Ormerod, J. (1).

On November 20, 1948, the infant plaintiff, David Charles Murray, a boy aged six years, was taken by his father to see an ice-hockey match at the Harringay Arena, occupied by the defendants, where they promoted ice-hockey matches. The only seats available were in the front row at one side, and the father paid for and took tickets in that row. There was a wooden barrier three feet high around the arena, and at the ends of the arena there was netting eight feet nine inches high, but not in front of the seats in question. Soon after the game started the puck, a rubber disc, three inches in diameter and one inch thick, with which the game is played, was struck out of the arena and hit the boy over the left eye, causing such injury that the sight of that eye was seriously impaired. The boy, through his father, claimed damages from the defendants in respect of his injury on the ground of neglect by the defendants to make the premises as safe as reasonable care and skill could make them. The father also claimed damages.

Ormerod, J., dismissed the action. He said that the danger that the puck might leave the arena was not an unusual danger. It was a risk inherent in the game and one which a spectator ought to have foreseen and which the boy's father had admittedly foreseen. He was satisfied that the defendants had taken all reasonable precautions for the safety of spectators, and that the risk, which was incidental to the game, was accepted by the spectators.

The plaintiffs appealed.

Scott Henderson, K.C., and *H. G. Garland* for the plaintiffs. The contractual duty of the defendants was to make the premises as safe as care and skill could make them, both as to structure and adaptation for the particular purpose for which they were being used. They knew that the puck was liable to leave the rink and it was their duty to adopt proper safeguards or to accept liability for the risk. The judge has found that it was a risk inherent in the game and one that was accepted by the spectator, but "volens" cannot apply to a child of six years, nor does it apply to a contract unless such a term is to be implied.

Berriman, K.C., and *R. M. Everett* for the defendants. The duty lying on the defendants here is clearly laid down by Scrutton, L.J., in *Hall* v. *Brooklands Auto Racing Club* (2).

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(1) [1951] W. N. 38.

(2) [1933] 1 K. B. 205, 2~~2~~14.

[SINGLETON, L.J. If the occupiers invite or allow children to be brought into the front row of the arena do you still apply the test which applies to the ordinary spectator?]

Yes. Parents know the inherent and foreseeable risk of the game. The position, surely, is that the child runs no greater risk because of his infancy.

[SINGLETON, L.J. But can you say that he has taken the risk on himself?]

The content of the contract made with every person who takes a ticket must be the same and must be judged by what any reasonable member of the public must have intended should be the term of the contract: *per* Greer, L.J., in *Hall* v. *Brooklands Auto Racing Club* (2).

[COHEN, L.J. You cannot maintain the contract against a child and he is not bound to rely on the contract against you. What then is the position of the occupier?]

His only duty is to take reasonable care to prevent damage from usual dangers of which he knows, and not to guard against unlikely and improbable risks.

Cur. adv. vult.

June 15. The following judgment was read.

SINGLETON, L.J., stated the facts and continued:—The evidence given on the hearing was somewhat meagre. On behalf of the plaintiffs the father was called; he had watched games at the rink on a few occasions. A surveyor was called to speak as to a plan; he had never seen the game played. And a clerk from the solicitors gave evidence that he watched a game on November 1, his visit being for the purposes of the case.

On behalf of the defendants a surveyor was called to say that the rink was constructed on the same plan as certain other rinks he knew; he had watched a few games. And a vice-president of the British Ice Hockey Association, an international player of repute, gave evidence that the construction of the rink was in accordance with the generally recognized practice in this country, in Canada, in the United States and throughout Europe.

There was no evidence from anyone connected with the management; no evidence to show how long the rink had been in existence; no evidence to show the number of persons who normally attended matches; and no evidence to show whether there had been any other accidents there. In a sense this appears to be unsatisfactory, and yet it would seem that there are ways in which the plaintiffs might have obtained information on these matters.

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(2) [1933] 1 K. B. 205, 223, 224.

In the ordinary and better known game of hockey a defending player will often hit the ball into touch when he is pressed. This kind of thing is discouraged in ice-hockey, and a player who deliberately hits the puck out at the side finds himself liable to a minor penalty which may entail his being ordered into the penalty box for two minutes. None the less the puck does go over the barrier at one side or the other on occasions. The father said that it had gone over five or six times when he had watched—he reduced this when cross-examined—and that it went over fast; and the solicitors' clerk agreed as to the one occasion on which he had been there. The surveyor called on behalf of the defendants said that the puck did go out from time to time, but that he had not seen it go out fast: "it generally occurred when "two sticks clashed"; and "it came up and over".

The vice-president said that there was no doubt that from time to time the puck did go out over the sides. Asked what caused that, he replied: "That can happen on a rebound or "when two players get their sticks at the puck about the same "time. . . . It is bound to be an accident. There is no advan-"tage in doing it". He was asked how many times during his thirty-five years' playing experience he had known players to be hurt—faces cut or something of that sort—and he answered: "I "should say, during my playing time, perhaps once or twice a "season". His evidence—and it was supported by the evidence of the surveyor—was that at no rink which he knew was any protection provided at the sides, and that to put netting along the sides would interfere with the view of the spectators so as to cause the game to cease to be a spectacle. The judge accepted this evidence. He said: "I was, however, satisfied on the "evidence that netting would cause a very serious obstruction "to the vision of those spectators sitting in the seats below the "level of the top of the nets and would be such that no spectators "would wish to sit in those seats".

There was no evidence to show that any serious accident, such as that which happened to the infant plaintiff, had ever before happened to a spectator anywhere. The game is played at a fast speed, and it is obvious that from time to time the puck may be hit out on one side or on the other, though the occasions on which that happens are much fewer than those on which the ball is hit into touch during a game of ordinary hockey. It is equally obvious that someone may be hit if the place is full of spectators; and a blow from the puck may be very unpleasant: it is hard and it has a rather sharp edge. Yet I do not see that the risk of injury or damage is any greater than it is to a spectator at the ordinary game of hockey—and he takes the risk of that. A blow from a cricket ball or from a hockey ball may cause serious hurt. It may be said that it is easier for the spectator to see and to avoid a ball, but that depends on the state of the light. A hockey ball may be hit out at great speed from close to the touchline.

No complaint is made by the plaintiffs as to the structure; but they say that there ought to have been some protection (netting) for spectators, that there is to be implied into the contract a term that the place was reasonably fit for the purpose for which it was used, and that the defendants had taken no precautions to guard against a danger which could reasonably be expected to occur.

When payment is made for admission to premises a contractual relationship is established between the payer and the person or persons receiving payment, the defendants. There were no express terms, and thus the liability of the defendants depends on the terms to be implied in the contract. I assume that the infant plaintiff is to be regarded as having entered into a contract with the defendants.

In *Cox* v. *Coulson* (3) the Court of Appeal had to consider a claim by one of the audience at a theatre who had been injured by the discharge of a shot during the performance of the play. All the members of the court were agreed that the contractual relationship to be inferred was that of invitor and invitee. Pickford, L.J., said: "This, I think, creates the relationship of "invitor and invitee, and in such a case, from the nature of the "invitation, the defendant's obligation, I think, is not confined "to the structure. In addition to his obligation with regard to "the structure and the further obligation not to give a perform"ance of an intrinsically dangerous nature, or, if he does so, to "take the consequences, he is, I think, under an obligation to "take reasonable care that the performance of the play does not "expose to danger the person whom he invites to see it".

This view was adopted in *Sheehan* v. *Dreamland, Margate, Ld.* (4), where Bankes, L.J., after repeating the words of Pickford, L.J., set out above, said: "In the present case there was

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(3) [1916] 2 K. B. 177, 187.

(4) (1923) 40 T. L. R. 155.

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" no evidence that this performance of the Luna Ball was intrinsically dangerous. Several thousands had taken part in it " within the space of two months and there had only been two " accidents ", and, " Accepting the Lord Justice's rule of law " that it was for the plaintiff to show evidence of negligence in a " case where the question was whether the plaintiff had been " exposed to danger, he was unable to find any such evidence in " this case ".

I am not sure that it matters whether it is called negligence or breach of the implied term to take reasonable care: in either event it is for the plaintiff to establish his case. I do not think it can be said upon the evidence that the game of ice hockey is intrinsically dangerous to spectators.

In *Hall* v. *Brooklands Auto Racing Club* (5) it was held that it was the duty of the appellants, the owners and occupiers of the course, to see that it was as free from danger as reasonable care and skill could make it, but that they were not insurers against accidents which no reasonable diligence could foresee or against dangers inherent in a sport which any reasonable spectator can foresee and of which he takes the risk. Scrutton, L.J., after repeating words of Lord Wensleydale in *Mersey Docks Trustees* v. *Gibbs*, said (6): " This is not an absolute warranty of safety, " but a promise to use reasonable care to ensure safety. What " is reasonable care would depend on the perils which might be " reasonably expected to occur, and the extent to which the " ordinary spectator might be expected to appreciate and take " the risk of such perils. Illustrations are the risk of being hit " by a cricket ball at Lords or the Oval, where any ordinary " spectator in my view expects and takes the risk of a ball being " hit with considerable force amongst the spectators, and does " not expect any structure which will prevent any ball from " reaching the spectators. An even more common case is one " which may be seen all over the country every Saturday afternoon, spectators admitted for payment to a field to witness a " football or hockey match, and standing along a line near the " touchline. No one expects the persons receiving payment to " erect such structures or nets that no spectator can be hit by " a ball kicked or hit violently from the field of play towards the " spectators. The field is safe to stand on, and the spectators " take the risk of the game ".

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(5) [1933] 1 K. B. 205, 214.

(6) (1864) L. R. 1 H. L. 93.

Scrutton, L.J., after citing the words of Swinfen Eady, L.J., in *Cox* v. *Coulson* (7), went on to say (8): "I think to all these "statements there must be added a term that there is no obligation to protect against a danger incident to the entertainment "which any reasonable spectator foresees and of which he takes "the risk". Greer, L.J., said (9): "In my judgment both "parties must have intended that the person paying for his "licence to see a cricket match, or a race, takes upon himself "the risk of unlikely and improbable accidents, provided that "there has not been on the part of the occupier a failure to take "usual precautions. I do not think it can be said that the "content of the contract made with every person who takes a "ticket is different. I think it must be the same, and it must "be judged by what any reasonable member of the public must "have intended should be the term of the contract". Slesser, L.J. (10), said that the duty was founded in contract and was to take reasonable care that the public may use the premises without danger to their lives or property.

It seems to me, on the authorities to which I have referred, that the defendants are able to say with some force: "the game is not intrinsically dangerous to spectators. It is true to say that the puck may go among them from time to time: every ordinary or reasonable spectator knows that and takes the risk of accident or injury arising therefrom, which upon the evidence is unlikely or improbable (to use the words of Greer, L.J.). We have nets at the ends and we have taken the usual precautions adopted wherever the game is played. People wish to see the spectacle and they undertake such risk as there is in watching it".

Ormerod, J., took the view that the risk of the puck going over the side was not an unusual danger and that the principle of the decision in *Indermaur* v. *Dames* (11) did not apply to this case. He did not find negligence on the part of the defendants, nor did he find any breach of the term to be implied into the contract. He rejected the submission of Mr. Scott Henderson that the defendants must be liable on the ground that they did nothing for the protection of the plaintiffs. He said: "They "provided a rink which was structurally safe and designed in "accordance with a pattern in universal use". Thus he must be taken to have found that there was no failure to take usual

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(7) [1916] 2 K. B. 177.

(8) [1933] 1 K. B. 217.

(9) Ibid. 223, 224.

(10) Ibid. 228.

(11) (1866) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

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precautions. He also found that the plaintiffs voluntarily undertook the risk of accident.

I regard it as clear from the authorities that the implied term is not that the occupiers shall guard against every known risk. There are some which every reasonable spectator foresees and of which he takes the risk. It may strike one as a little hard that this should apply in the case of a six-year-old boy, but in considering liability under an implied term in this contract it would not be right to introduce a wider term because one of the parties is a youth. The implied term is to take reasonable care, and in measuring that one must have regard to the reasonable man (or spectator), and the duty arising under it does not involve an obligation to protect against a danger incident to the entertainment which any reasonable spectator foresees and of which he takes the risk: see *per* Scrutton, L.J., above, and the footnote in *Stanley* v. *Powell* (12).

I am in favour of dismissing the appeal upon two grounds: 1.—It was not proved to the satisfaction of the trial judge that the defendants were negligent or that they failed to do anything which they were under any obligation to do—and there is nothing which would justify this court in interfering with that finding. 2.—The injury sustained by the boy resulted from a danger incidental to the game, of which spectators took the risk.

COHEN, L.J. I have had an opportunity of reading the judgment of my brother Singleton, and I cannot usefully add anything to the reasons he has given for dismissing this appeal.

MORRIS, L.J. I have also had the opportunity of reading the judgment which has just been delivered, and I am in agreement with it.

Appeal dismissed.

Solicitors: *Bishop & Cooke; Gardiner & Co.*

A. W. G.

(12) [1891] 1 Q. B. 86.

THUROGOOD *v.* VAN DEN BERGHS & JURGENS LD.

C. A.

1951
Feb. 8, 9,
12, 13;
Mar. 2.

Cohen,
Asquith and
Birkett, L.JJ.

[1949 T. 143.]

Factories—Manufacture of margarine—Separate maintenance and repair building within curtilage of factory—Electric fan used in factory under test in maintenance building—Workman's injury by blades—Whether maintenance building separate factory—Employer's duty to fence fan—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14, 151, *sub-ss.* 1, 6.

A factory used for the manufacture of margarine contained within its curtilage a separate building in which maintenance work in connexion with the main part of the factory was carried out. An electrician employed by the owners was engaged in that maintenance building in testing an electric fan which normally worked in a ventilator in one of the rooms in the factory where one of the processes in the manufacture of margarine was carried on. The fan was connected with the electric mains and running, and the electrician was kneeling beside it on the ground, when in some unexplained way his fingers came into contact with the blades and he was injured. He brought an action against the factory owners for damages for breach of their duty under s. 14 of the Factories Act, 1937, and for breach of their common-law duty to provide a safe system of work.

Devlin, J., dismissed the action, holding (1.) that the maintenance building was a separate factory within the meaning of s. 161, sub-s. 6, of the Act, and that the fan, not being part of the machinery of that separate factory, was not required by s. 14 of the Act to be fenced; and (2) that, though the employers were in breach of their common-law duty to provide a safe system of work, the accident to the workman, which was unexplained, was an unforeseeable consequence of that breach of duty. On appeal by the plaintiff:—

Held (1.) that the processes taking place in the maintenance building, in particular the repair and testing of machinery used in the manufacture of margarine, were incidental to the main purpose of the factory, and the maintenance building was accordingly not a separate factory; that the fan was part of that machinery and was required to be fenced when being tested in the maintenance building no less than it would be required to be fenced if it were being oiled or tested in situ; and that the employers were therefore in breach of s. 14 of the Act.

London Co-operative Society Ld. v. *Southern Essex Assessment Committee* [1942] 1 K. B. 53, approved and applied.

Semble, if the maintenance building had been a separate factory, then, on the principle laid down in *Parvin* v. *Morton Machine Co.* 1950 S. C. 371, the fan would not have been machinery required to be fenced under s. 14.

[Reported by J. A. Griffiths, Esq., Barrister-at-Law.]

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(2.) (On the claim at common law) that the negligence in question consisted in the placing of the fan (a) for purposes of a test which required it to be set in motion, (b) on the floor, (c) without a guard; that the presence of reasonable anticipation of damage determined the presence of negligence; and that, accordingly, as the plaintiff's injury was the direct consequence of that negligence, he was entitled to damages at common law, foreseeability of the particular damage actually sustained being irrelevant to recoverability, and directness of causation being the sole criterion in that connexion. The criterion of foreseeability was relevant only to the prior question whether or not there was negligence in fact.

Per curiam: In re Polemis and *Furness, Withy & Co. Ld.* [1921] 3 K. B. 560, is still good law.

Decision of Devlin, J., reversed on both points.

APPEAL from Devlin, J.

The plaintiff was an electrician employed by the defendants on premises of the defendants which were used for the manufacture of margarine. The premises were a factory within the meaning of the Factories Act, 1937 (1). On December 4, 1947, the plaintiff, in the course of his employment, was engaged in testing an electric wall fan which had been taken from the margarine-manufacturing part of the factory to a separate building where repair work was done. He had, by feeling its motor, to check for vibration and heat, and, while he was so feeling the motor of the fan, his right hand was caught by the revolving blades and his fingers were seriously injured. For the purposes of testing the fan had been placed on the floor of the maintenance shop, and at the time of the accident it was connected with the mains, the motor was running, and the plaintiff was squatting on the floor beside the fan, kneeling on his right knee to one side of the machine with his right hand beside his knee. The fan had to be tested for heat and vibration by placing a hand on the housing of the machine and, just as the plaintiff was placing his left hand on the housing for this purpose, his right hand by some means or other became entangled in the blades. The maintenance building was within the curtilage of the factory.

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(1) Factories Act, 1937, s. 151, sub-s. 1: "The expression 'factory' "means any premises in which, or "within the close or curtilage or "precincts of which, persons are "employed in manual labour in any "process for or incidental to any of "the following purposes—namely, (*a*) "the making of any article or part of "any article . . . and (whether or not "they are factories by reason of the "foregoing definition) the expression "'factory' also includes the following "premises in which persons are em- "ployed in manual labour . . . (*x*) any "premises in which mechanical power "is used in connexion with the making "or repair of articles of metal or wood "incidentally to any business carried "on by way of trade or for purposes "of gain".

Sub-s. 6: "Where a place situate "within the close, curtilage, or pre- "cincts forming a factory is solely "used for some purpose other than the "processes carried on in the factory, "that place shall not be deemed to "form part of the factory for the pur- "poses of this Act, but shall, if other- "wise it would be a factory, be "deemed to be a separate factory".

The plaintiff brought an action for damages for personal injuries against the defendants, alleging negligence and/or breach of statutory duty.

He contended that the blades should have been securely fenced as required by s. 14 of the Act of 1937, and that the defendants had exposed him to unnecessary risk and had failed to provide a safe system of working. The defendants denied that the fan was " machinery " within the meaning of the Factories Act, and said that the plaintiff's injuries were due to his own negligence or breach of duty under s. 119 of the Act.

The building in which the maintenance work was done was divided into three sections, one of which was electrical, and at the time of the accident the plaintiff was in the electrical section. The fan which he was testing was normally situated in the mouth of a ventilator in a room in which one of the processes connected with the manufacture of margarine was carried on in the factory.

Devlin, J., gave judgment for the defendants, holding that the separate building constituted a separate factory within s. 151, sub-s. 6, of the Factories Act, 1937, and that the fan was an article which had been taken into that separate factory for repair and was not part of the machinery of that separate factory, and therefore was not required to be fenced. He also found for the defendants at common law, for, although in his judgment there had been negligence on the part of the defendants, the plaintiff had failed to prove that the injuries claimed for were the direct consequence of that negligence.

The plaintiff appealed.

F. W. Beney, K.C., and *Martin Jukes* for the plaintiff. With regard to the claim under the Factories Act, 1937, the defendants were under a duty to ensure that the fan was securely fenced while it was under test in the maintenance shop: see s. 14 of the Act. By virtue of s. 149 the operation of s. 14 is restricted to machinery in a factory as defined by s. 151. It is submitted that the work carried on in the maintenance shop is a process for or incidental to the making of margarine, and that consequently the shop forms part of a factory making margarine, the " article " for the purposes of s. 151, sub-s. 1, being margarine. Accordingly the fan, being part of the machinery of that factory, was required to be fenced under s. 14.

If that contention be wrong, then it is submitted that the maintenance shop is still within the expression "factory" as defined by s. 151, sub-s. 1, by virtue of para. (*x*) of that sub-section. In this connexion it is submitted that the fan does not necessarily cease to be a machine because it is also an article. It is submitted that the maintenance shop is not a separate factory within s. 151, sub-s. 6, since it is not a place "solely "used for some purpose other than the processes carried on in "the factory": see *London Co-operative Society* v. *Southern Essex Assessment Committee* (2). That case decided that a laundry canteen was entitled to be derated as forming part of an industrial hereditament, a laundry, since it was not a place which was "solely used for some purpose other than the manufacturing "process or handicraft". Although that was a decision under the Rating Acts, not the Factories Acts, it is important to note that s. 3, sub-s. 2, of the Rating and Valuation (Apportionment) Act, 1928, provides that the expressions "factory" and "work-"shop" shall have respectively the *same meanings* as in the Factory and Workshop Acts, 1901 to 1920. In *London Co-operative Society* v. *Southern Essex Assessment Committee* (3), s. 149, sub-s. 4, of the Act of 1901, was under consideration, and that sub-section is in all material respects identical with s. 151, sub-s. 6, of the Act of 1937.

Further, it is clearly established by the authorities that, where the definition of a factory in the Factories Acts is imported into some other Act, then the same principles of construction are to be applied as would be applied under the Factories Acts: see *per* Scrutton, L.J., in *Bailey Revenue Officer* v. *Potteries Electric Traction Co.* (4); *per* Talbot J., in *Cardiff Revenue Officer* v. *Cardiff (Borough) Assessment Committee* (5); *per* Somervell, L.J., in *Stanger* v. *Hendon Borough Council* (6). Accordingly the decision in *London Co-operative Society* v. *Southern Essex Assessment Committee* (7) was binding on the judge and cannot be distinguished.

As for the allegation of breach of duty at common law, the defendants have neglected their common-law duties as employers and have failed to provide a safe system of working. As a direct

(2) [1942] 1 K. B. 53.
(3) [1942] 1 K. B. 53.
(4) [1931] 1 K. B. 385, 483, 493.
(5) [1931] 1 K. B. 47, 77.
(6) [1948] 1 K. B. 571, 577.
(7) [1942] 1 K. B. 53.

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consequence of that omission the plaintiff was injured. Once negligence has been established it is irrelevant to consider whether the damage actually sustained could have been foreseen. The test of foreseeability is only relevant in determining whether the act or omission complained of was negligent or innocent. Once negligence has been established the only question which remains to be determined is whether the damage actually sustained was the direct consequence of it: *In re Polemis and Furness, Withy & Co. Ld.* (8).

[They also referred to *Portsmouth Corporation* v. *Smith* (9); *In re Wood's Estate* (10); *Parvin* v. *Morton Machine Co.* (11), and *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (12).]

Dennis Gerrard, K.C., *John Thompson* and *D. Tolstoy* for the defendants. The work of the maintenance shop is not a process for or incidental to the making of the end product, in this case margarine: it is the repair of articles which are used in other parts of the factory. Accordingly, it forms a separate factory within the meaning of s. 151, sub-s. 6, since it falls within s. 151, sub-s. 1, para. (x), and the fan was an article which had been brought into that separate factory for repair. It follows that the fan was not part of the machinery of that separate factory, and that, since ss. 14, 15 and 16 relate to the fencing of *machinery*, there was no statutory obligation on the defendants to fence the fan while it was under repair: see *per* Lord Strachan in *Parvin* v. *Morton Machine Co.* (13).

The judge construed s. 151, sub-s. 6, as if it read: "Where "a place . . . is solely used for some purposes other than the "processes for or incidental to the main purpose of the factory". But this construction does not assist the plaintiff, since only those processes which contribute directly to the making of the main product are processes "for or incidental" to the making of it. A maintenance shop or a canteen is not incidental to the making of the main product, in this case margarine, although it may well be essential to the working of the factory. Any other construction would make the concluding words of s. 151, sub-s. 6, "but shall, if otherwise it would be a factory, be deemed "to be a separate factory", otiose. For these reasons, it is submitted, *London Co-operative Society* v. *Southern Essex Assessment Committee* (14) was wrongly decided.

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(8) [1921] 3 K. B. 560.
(9) (1885) 10 App. Cas. 364, 371.
(10) (1886) 31 Ch. D. 607, 615.
(11) 1950 S. C. 371.
(12) [1940] A. C. 152.
(13) 1950 S. C. 371, 374.
(14) [1942] 1 K. B. 53.

In any event, s. 151, sub-s. 6, is plainly ambiguous, and accordingly, since s. 14, when read with s. 130, is a penal section, any ambiguity should be resolved in favour of the employers: see *per* Lord Simonds in *London and North Eastern Ry. Co.* v. *Berriman* (15).

To turn to the common-law issue, it is submitted that the plaintiff can only succeed in negligence if he can establish a foreseeable nexus between the act or omission complained of and the damage actually sustained by him. The question to be determined is not whether any damage was likely to result from the act or omission complained of, but whether the particular damage sustained ought to have been anticipated by the defendants: see *Bourhill* v. *Young* (16).

[They also referred to *In re Polemis and Furness, Withy & Co. Ld.* (17); *Aldham* v. *United Dairies (London) Ld.* (18); *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (19), and *Regional Properties Co. Ld.* v. *Frankenschwerth* (20).]

Jukes in reply. The Factories Act is both a remedial and a penal Act. The court will not adopt a strict interpretation of provisions designed to promote the safety and welfare of persons employed in factories. It is submitted, however, that the language of s. 151, sub-s. 6, is plain and unambiguous, and accordingly the question whether a broad or narrow interpretation of it should be adopted does not arise: see *per* Pollock, C.B., in *Nicholson* v. *Field* (21) and *London and North Eastern Ry. Co.* v. *Berriman* (22). The word "purpose" is used in the sub-section in order to include a wider field of activities than purely industrial processes; for example, a room set aside for a social club.

The concluding words of the sub-section, "but shall, if other-"wise it would be a factory, be deemed to be a separate factory", are otiose; or, alternatively, it is submitted, they were inserted ex abundanti cautela.

It is to be noted that s. 149, sub-s. 4, of the Act of 1901 refers to "manufacturing processes". It is submitted, therefore, that, by deleting the adjective in the corresponding sub-section of the Act of 1937, s. 151, sub-s. 6, the legislature intended that a wider interpretation should be given to the expression "processes" than to the expression "manufacturing processes".

(15) [1946] A. C. 278, 313.
(16) [1943] A. C. 92.
(17) [1921] 3 K. B. 560.
(18) [1940] 1 K. B. 507.
(19) [1940] A. C. 152.
(20) [1951] 1 K. B. 631.
(21) (1862) 7 H. & N. 810, 817.
(22) [1946] A. C. 278, 295, 301, 308.

Parvin v. *Morton Machine Co.* (23) is distinguishable, for in that case the machine which caused the injury was the product of the factory, not part of the machinery which was used in the process of manufacture.

Cur. adv. vult.

March 2. The following judgments were read:—

COHEN, L.J. Although I have come to a different conclusion from that reached by Devlin, J., I should like to express my indebtedness to him, both for the conciseness with which he stated the relevant facts and for the clarity with which he has brought out the points at issue.

I shall adopt the two paragraphs in which he has marshalled the facts and the succeeding paragraph in which he has stated the nature of the plaintiff's claim. These three paragraphs read as follows: "On December 4, 1947, the plaintiff was injured in "the factory of the defendants by whom he was employed. The "factory is one for the production of margarine. Within the "curtilage there is a separate building in which maintenance work "in connexion with the main part of the factory is done; it is "divided into three sections, electrical, mechanical and carpentry. "The plaintiff was an electrician working in the electrical section "under the supervision of one Cole. At the time of the accident "Cole and the plaintiff were testing an electric fan. The fan "came from a room in which one of the processes connected "with the manufacture of margarine was carried on, and it was "normally situated at the mouth of a ventilator, its purpose being "to serve as an extractor of steam. It is a large fan, about 24″ "in diameter, and the motor is housed behind the blades. In "its normal position it is guarded in front by louvres set in the "wall, and there is no need for any guard behind, because it is "situated, as I have said, in the mouth of the ventilation duct.

"The fan had been taken down and brought to the electrical "shop where it was laid on the floor. At the time of the accident "it was connected to the mains, the motor was running, and Cole "and the plaintiff were squatting beside it to see if after running "the bearings got heated or there was undue vibration. This "they would do by feeling the outside of the housing with their "hands. The plaintiff was kneeling on his right knee to one side "of the machine with his right hand beside his knee and he put "his left hand on to the housing. He did not intend to use his

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(23) 1950 S. C. 371.

"right hand for any purpose; but, just as he put his left hand on "the housing, he must also have moved his right hand in some "way which he cannot remember or explain, and which was not "observed, and it was caught in the blades and some of his fingers "were seriously injured. I am satisfied that the plaintiff's "inability to explain what happened is quite genuine: it is not "a cloak to conceal some silly action on his part of which he is "conscious. I daresay that, forgetting about the blades, he "moved his hand in some half-conscious gesture.

"On these facts, the plaintiff claims that the defendants were "in breach of their duty under s. 14 of the Factories Act, 1937, "and also at common law. I shall consider first the position "under the Act. If the blades of the fan were a 'dangerous part "'of any machinery' within the meaning of s. 14, they certainly "were not guarded. It has not been argued that they were not "dangerous. The defence is that the fan was not 'machinery' "within the meaning of the section".

Section 14 is included in that part of Part II of the Act which contains provisions for the fencing of dangerous machinery. Section 12 concerns prime movers, s. 13 transmission machinery and s. 14 "other machinery". So far as material s. 14 reads as follows: "Every dangerous part of any machinery, other than "prime movers and transmission machinery, shall be securely "fenced unless it is in such a position or of such construction "as to be as safe to every person employed or working on the "premises as it would be if securely fenced".

By virtue of s. 149 the operation of s. 14 is restricted to machinery in a factory as defined in s. 151. [His Lordship read s. 151, sub-s. 1, and continued:—] It is not disputed that the defendants' margarine factory is a factory within the first part of that definition; but the defendants contend, first, that the separate building in which repairs to machinery are carried out (I shall refer to it henceforth as the "engineering shop") is to be deemed to be a separate factory by reason of s. 151, sub-s. 6. Secondly, they contend that, the engineering shop being a separate factory for the repair of plant, the ventilating fan was the article of metal which was being repaired in that separate factory and not part of the machinery of that factory.

Neither before the judge nor before us did Mr. Gerrard for the defendants formally concede that, if he were wrong in the first of these contentions, and the engineering shop must be regarded as part of the margarine factory, he would necessarily fail in his defence; but he did not strenuously argue to the contrary. In this he was, I think, wise, for if the engineering shop is to be treated as part of a factory for the making of margarine, the "article" for the purposes of s. 151, sub-s. 1, is margarine and the ventilating fan is, in my opinion, clearly machinery within that factory.

The judge, however, held that the defendants had established both their propositions. He arrived at his conclusion as follows: he rejected the argument put forward by the plaintiff that, in deciding whether a place was used solely for some purpose other than the processes carried on in the factory, one looked only to see what processes were carried on in the geographical area comprised in the factory: he held, and I think rightly, that the sub-section must be construed as if it read "for some purpose "other than the processes for or incidental to the main purpose "of the factory", in the present case, the making of margarine.

He then proceeded to consider whether the work done in the engineering shop could be said to be a process incidental to the making of margarine, and answered this question in the negative. He therefore held that it was a separate factory under s. 151, sub-s. 6, since it clearly fell within para. (*x*) of s. 151, sub-s. 1.

Having reached that stage, he accepted the defendants' argument that the ventilating fan was not machinery used in the separate factory, but the article which was being repaired in that separate factory. He considered that this conclusion was supported by a decision of Lord Strachan in the Court of Session in *Parvin* v. *Morton Machine Co.* (24), a decision which has since been confirmed in the Inner House (25).

The point in this reasoning at which I break away from Devlin, J., is where he decided that the processes in the engineering shop were not incidental to the making of margarine. In dealing with this point, Devlin, J., was faced with the difficulty that in *London Co-operative Society* v. *Southern Essex Assessment Committee* (26), a Divisional Court had held that a canteen was not a place which was "solely used for some purpose "other than the manufacturing process or handicraft" carried on in a laundry. That was a decision under the Rating Acts, not the Factories Act, 1937; but s. 3, sub-s. 2, of the Rating and Valuation (Apportionment) Act, 1928, so far as material provides: ". . . the expressions 'factory' and 'workshop' have respec-"tively the same meanings as in the Factory and Workshop

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(24) 1950 S. C. 371.
(25) 1950 S. C. 377.
(26) [1942] 1 K. B. 53.

"Acts, 1901 to 1920". I pause here to add that s. 149, sub-s. 4, of the Factory and Workshop Act, 1901, was in all material respects identical with s. 151, sub-s. 6, of the Factories Act, 1937.

Devlin, J., recognized that, if the case cited had been a decision under the Factories Act, it would have been almost conclusive in favour of the plaintiff in the present case. But he said "it is a decision under a rating Act, and I do not think, "paradoxical though it may sound, that a definition section "which is common to two Acts is necessarily to be given the "same meaning in both. The way in which sections taken from "an earlier Act should be construed in the later Act has been "the subject of varying judicial comment". He then proceeded to consider a number of authorities, and came to the conclusion that he had a free hand. In none of the cases which he cited, however, were any words so definite as "shall have the same "meaning" used.

Mr. Gerrard, I think, displayed a wise discretion in not seeking to support this part of the judge's reasoning. He accepted that the expression which we are considering must bear the same meaning in the Factories Act as in the Rating Acts, but he argued that the *London Co-operative Society* case (27) was wrongly decided. He admitted that the words "for or incidental "to" must be read into s. 151, sub-s. 6, but he submitted that only those processes which contributed directly to the making of margarine were processes "for or incidental to the making of" margarine. Neither canteens nor repair shops were, he said, incidental to the making of margarine: they might be essential to the working of the factory; but they were not incidental to the making of margarine. He and Mr. Thompson argued that, unless this view were correct, there would never be a case in which the concluding words of s. 151, sub-s. 6, "but shall, if "otherwise it would be a factory, be deemed to be a separate "factory", could operate. I do not think that this is true. Suppose in the present case the defendants were to erect within the ring fence of their present factory a new building and use it for the repair of other people's machinery, that would be a process carried on within the geographical area of the margarine factory, but it would not be a process for or incidental to the making of margarine.

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(27) [1942] 1 K. B. 53.

Be that as it may, Mr. Gerrard and Mr. Thompson pointed out that this was an ineptly drawn sub-section which plainly contained an ambiguity. That being so, and s. 14 (when read with s. 130) being a penal section, the ambiguity must, they said, be resolved in favour of the employer. They relied in particular on the following observations of Lord Simonds in *London and North Eastern Railway Co.* v. *Berriman* (28): "I think that the "same rule of construction must apply whether the duty and the "penalty are imposed by the same section of an Act or by "different sections of an Act or the one by a rule made under the "Act and the other by the Act itself. That rule of construction "is very well settled; though not always easy of application. I "will state it by three familiar citations. In *Tuck & Sons* v. "*Priester*, Lord Esher, M.R., said (29): 'We must be very "'careful in construing that section, because it imposes a "'penalty. If there is a reasonable interpretation which will "'avoid the penalty in any particular case, we must adopt that "'construction. If there are two reasonable constructions we "'must give the more lenient one. That is the settled rule for "'the construction of penal sections'. Lindley, L.J., in the "same case said (30): '. . . the well-settled rule that the court "'will not hold that a penalty has been incurred, unless the "'language of the clause which is said to impose it is so clear "'that the case must necessarily be within it'.

"Finally I will cite these words of James, L.J., delivering "the judgment of the Privy Council in *Dyke* v. *Elliott* (31): "'Where the thing is brought within the words and within the "'spirit, there a penal enactment is to be construed like any "'other instrument according to the fair common-sense meaning "'of the language used and the court is not to find or make any "'doubt or ambiguity in the language of a penal statute where "'such doubt or ambiguity would clearly not be found or made "'in the same language in any other instrument'. It was suggested, my Lords, that some distinction is to be made in the "application of this rule according to the avowed purpose of the "Act. It would, I think, be unfortunate if any decision of this "House gave any colour to such a suggestion. Wherever the "legislature prescribes a duty and a penalty for the breach of it, "it must be assumed that the duty is prescribed in the interests "of the community or some part of it and the penalty is prescribed as a sanction for its performance. Whether the purpose

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(28) [1946] A. C. 278, 313.

(29) (1887) 19 Q. B. D. 629, 638.

(30) Ibid. 645.

(31) (1872) L. R. 4 P. C. 184, 191.

"is, as it was in *Tuck's* case (32), the protection of copyright, "or, as in the case before your Lordships, the protection of the "life and limb of certain workers, the same principle prevails. "A man is not to be put in peril upon an ambiguity, however "much or little the purpose of the Act appeals to the predilection "of the court".

But those observations do not tell the whole story. Even penal sections must be construed reasonably. I would refer to the citation from James, L.J., which I have just read and to the speech of Lord Macmillan, also one of the majority in *London and North Eastern Railway Co.* v. *Berriman* (33), where he said: "Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its "intention, beyond the fair and ordinary meaning of its language. "I quote and adopt the words of Alderson, B.: 'The rule of law, "'I take it, upon the construction of all statutes . . . is, whether "'they be penal or remedial, to construe them according to the "'plain, literal, and grammatical meaning of the words in which "'they are expressed, unless that construction leads to a plain "'and clear contradiction of the apparent purpose of the Act, or "'to some palpable and evident absurdity': *Attorney-General* v. "*Lockwood* (34)".

I think that the construction for which Mr. Gerrard contends involves placing a strained and unnatural meaning on the word "incidental". The oiling of machinery used in the manufacture of margarine is clearly incidental to the manufacture of it. So, in my opinion, is the testing of the machinery. Mr. Gerrard felt constrained to admit that if the testing had been done in situ or even in the building in which the fan was normally situate, and this accident had occurred, the employer would have been liable. I cannot think that the process of testing this vital part of the machinery ceases to be incidental to the manufacture because it is carried out under a separate roof.

Had I accepted the judge's view as to the meaning of "incidental", I should have had to consider whether he was right in holding that the ventilating fan in the engineering shop was not "machinery". He relied, as I have said, on the Scottish case of *Parvin* v. *Morton Machine Co.* (35). In that case the machine which caused the injury was the product of the factory, not part of the machinery which was used in the process of manufacture. Lord Strachan pointed out that, so long as a machine is in the course of construction or has not been finally adjusted or tested, there may have to be work done upon it which could not be done with a fence or guard in position. He came to the conclusion that there was nothing in the Act which indicated that a machine in such circumstances should be fenced.

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(32) 19 Q. B. D. 629.
(33) [1946] A. C. 278, 295.
(34) (1842) 9 M. & W. 378, 398.
(35) 1950 S. C. 371.

His decision was affirmed in the Inner House. The Lord Justice-Clerk said (36): " At first blush I should have thought " that the purpose of this part of the Factories Act was to lay " down general provisions for ensuring the safety of the plant and " equipment which is installed in the factory for the purposes of " manufacturing whatever is the product of the factory and that " the nature and character of the product was a separate matter, " calling for separate treatment in appropriate cases. Indeed, it " is only where the product of the factory is machinery or " machines that the problem arises. The argument is that the " words ' any machinery ' which occur in s. 14, sub-s. 1, and " ' any machine ' which occur in s. 20 are unequivocal and " adequate to cover the dough-brake and that, as the purpose of " this part of the Act is the safety of the employees, we should " lean to a construction which promotes safety. This argument " seems to me to lay too much stress on the particular use of " ' any ' and to put out of view the general context in which the " words ' any machinery ' and ' any machine ' are found. The " significance of apparently general words must be governed by " the setting in which they are found "; and after considering the sections he remained of the same opinion. The other learned Lords agreed with him.

Lord Patrick said (37): " The different wording of the two " Acts, is, in any event, not sufficiently significant to produce so " major an effect as that these provisions of the 1901 Act applied " only to plant used in the process of production while the parallel " provisions of the 1937 Act apply to both plant and product. " This would be a major change in the outlook of the legislature " and one so drastic in effect that many of the provisions of " Part II could not be complied with in the process of manu- " facturing machinery. Thus I agree with the Lord-Ordinary " that while machinery is in the course of manufacture, assem- " blage, and testing, there may have to be work done upon it " while it is in motion which could not be done with a fence in " position, work which would not be ' examination, lubrication or " ' adjustment ', which alone are permitted when the fencing is

(36) 1950 S. C. 371, 378.

(37) Ibid. 381.

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"removed in the case of machinery to which this part of the Act "applies".

In the present case we are concerned not with the manufacture of a machine but with the repair of a machine. Bearing in mind, however, that for my present purpose I am considering the engineering shop as a separate factory the main purpose of which is repair, I think that the principle of *Parvin's* case (38) would apply. That decision is not binding on us, but, as Evershed, M.R., pointed out in *Regional Properties Ld.* v. *Frankenschwerth and Chapman* (39): "since the Acts to be construed are "the same in both Scotland and England . . . it is plainly desir-"able that the construction of the relevant parts of the Acts "should be the same on both sides of the border". Had I, therefore, been in agreement with Devlin, J., on the other points, I should have treated the principle of *Parvin's* case (40) as applicable and have dismissed the claim so far as it rested on breach of statutory duty.

I turn to the common-law claim. Here, too, I find myself unable to agree with the judge. I have had the opportunity of reading the judgment which Asquith, L.J., is about to deliver on this point, and do not desire to add any reasons of my own for considering that on this ground also the plaintiff is entitled to succeed.

As to contributory negligence, I see no reason for differing from the judge in his conclusion that the observations of Lord Wright in *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (41) apply and that the plaintiff's conduct was mere inadvertence and did not amount to negligence.

Mr. Gerrard did not seek to question the judge's finding that the plaintiff had not bound himself by electing to take his remedy under the Workmen's Compensation Acts; nor did he question the assessment of the damages at 2,453*l.* 16*s.* 10*d.*

In the result, the appeal in my opinion succeeds, and judgment should be entered for the plaintiff for that amount, with costs here and below.

Asquith, L.J. I entirely agree with what my Lord has said in regard to statutory liability under the Factories Act, 1937, and will add nothing under that head, but confine my judgment to the claim so far as it is based on negligence at common law.

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(38) 1950 S. C. 371.
(39) [1951] 1 K. B. 631, 637.
(40) 1950 S. C. 371.
(41) [1940] A. C. 152, 176.

The case made under this head was that the defendants had neglected their common-law duty as employers to provide a safe working system and safe plant, and that the plaintiff's injuries had been caused by this culpable omission. The judge found negligence itself proved; but, as I read his judgment, he found it unproved that the injuries claimed for were the direct consequence of that negligence. The negligence, according to him, consisted in placing the fan (1.) for purposes of a test which required it to be set in motion, (2.) on the floor, (3.) without a guard. The negligence lies in this triple and indivisible complex. True it is, the judge sometimes uses language which suggests that placing it on the floor amounted in itself to negligence, or that not providing it with a guard did not amount to negligence; but he cannot possibly mean what these phrases, isolated from their context, appear to say. For, taking the " guard ", for instance, he also said: " Assuming it " (that is, the fan) " was in a proper " place, I do not think it was negligent not to provide a guard ". This implies that, placed as it was, in what the judge considered an " improper " place, it did require a guard. So, again, he sometimes speaks as though the negligence lay solely in putting the fan on the floor; but clearly he did not mean that there would have been negligence if the fan (with or without a guard) had been put on the floor and not set in motion, or, though put on the floor and set in motion, had been provided with an adequate guard.

The negligence, therefore, notwithstanding the separatist logic which colours the judge's language, consisted in this tripartite act. The reason why the tripartite act of operating the fan—on the floor—unfenced was negligent, according to the judge, was because those conducting the test were likely to stoop over it, and it was reasonably foreseeable that some damage might result; for instance, a necktie or clothing might well get caught in the revolving blades and some corporal injury ensue. Indeed, he said that if the accident had occurred in that way he must have found the defendants liable.

One is tempted to suggest that some simpler type of damage might equally be a foreseeable consequence of this state of affairs; for instance, damage arising (as the damage did in this case) from some accidental contact between these sharp blades, revolving at their tips at 120 m.p.h., and some part of the person of an employee conducting or watching the test. But let us at this stage ignore this possibility, and be content to note the judge's premiss that damage of some kind might reasonably have been anticipated as likely to result.

C. A.

1951

THUROGOOD v. VAN DEN BERGHS & JURGENS LD.

Asquith, L.J.

Starting from this premiss the judge goes on to quote this well-known passage from the judgment of Warrington, L.J., in *In re Polemis and Furness, Withy & Co. Ld.* (42), holding (rightly, in my view), that that case has never been overruled and is still binding on this court: "The result may be summarized as "follows: the presence or absence of reasonable anticipation of "damage determines the legal quality of the act as negligent or "innocent. If it be thus determined to be negligent, then the "question whether particular damages are recoverable depends "only on the answer to the question whether they are the direct "consequence of the act".

The judge had already performed the process described in the first of these two sentences. Applying, and rightly at that stage and for that purpose, the test whether damage of some kind (for instance, the "necktie" kind) can be reasonably anticipated as likely to result from the defendant's act, he "determines the "quality of the act" as negligent. It only remained for him to perform the process described in Warrington, L.J.'s second sentence, namely, to decide whether the "particular damages", namely, the damage actually sustained, is recoverable. In answering that second question the foreseeability of the damage actually sustained is wholly irrelevant: directness of causation is the sole criterion of recoverability. The actual damage may be wholly different in character, magnitude or in the detailed manner of its incidence, from anything which could reasonably have been anticipated.

With the greatest respect for the very closely reasoned judgment of the judge, I cannot but think that he has at times lost sight of this principle. Take such a passage as this, from his judgment: "But in fact his injury did not happen in that way" (that is, through a necktie or clothing being caught in the blades); "It happened in a way that is still unexplained: and since no "one can do more than guess how he came to put his hand on "the blades, it is impossible to say that the defendants ought to "have foreseen that he might". In that passage the judge can hardly mean that the causation of the damage ceases to be direct by reason of the interposition, between the employers' negligence and the resulting damage, of any act of mere inadvertence (as opposed to contributory negligence) by the employee. *Caswell* v. *Powell Duffryn Associated Collieries Ld.* (43) is an authority to the contrary and was cited to the judge. Lord Wright (in a

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(42) [1921] 3 K. B. 560, 574.

(42) [1921] 3 K. B. 560, 574.

passage relating to statutory liability, but applicable in my view to common-law liability as well) said (44): "The policy of the "statutory protection would be nullified if a workman were held "debarred from recovering because he was guilty of some care-"lessness or inattention to his own safety, which though trivial "in itself threw him into the danger consequent on the breach "by his employer of the statutory duty. It is the breach of "statute, not the act of inadvertence or carelessness, which is "then the dominant or effective cause of the injury".

What Devlin, J., seems to mean is not that any and every intervening act of inadvertence will bar the workman's remedy by rendering the damage too "indirect" a result, but that it is the "unexplained" character of the particular act of inadvertence, in the present case, which constitutes such a bar. Indeed he says in terms that the fact that its character "cannot be foreseen" is what prevents the damage from being recoverable. But this is surely to re-introduce, when considering whether the damage was directly caused, a criterion which is not relevant to that question but is only relevant to the prior question of the existence or non-existence of negligence.

When one is considering whether the damage was directly caused it matters not whether the precise way in which in the event it came about is explained or unexplained, foreseeable or unforeseeable. It was unexplained why in the *Polemis* case (45) the fall of the plank caused the spark. It was unexplained in *Aldham* v. *United Dairies* (*London*) *Ld.* (46) (from which the judge cites a substantial passage) why the unattended pony, who had never before been more than restive, came to bite the plaintiff. It was unexplained through what act of inadvertence, occurring how, Caswell was injured. None the less these unexplained events were held to result directly from the defendant's negligence, or at all events not to break the chain of direct causation leading from that negligence to the damage.

These consequences are indeed avoided if one assumes that in the passage beginning, "It happened in a way that is still "unexplained", the judge has not yet addressed himself to the issue of direct causation of damage at all, but is still dealing with the issue of negligence or no negligence. But on that assumption new difficulties seem to me to emerge: for, first, he would, on that view, appear to be reopening a question which he had just answered in the affirmative and giving reasons which, if relevant, are reasons for going back on that answer—an answer which, nevertheless, he reaffirms later.

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(44) [1940] A. C. 152, 179, 180.
(45) [1921] 3 K. B. 560.
(46) [1940] 1 K. B. 507.

Then, again, although reasonable foresight of possible injury is the true criterion where negligence vel non is the issue, an employer who has created or permitted a dangerous condition to arise is reasonably expected to foresee and provide against the possibility of injury resulting from it, even though it so results through the intermediation of an act of inadvertence by the employee and even though that act of inadvertence be of a character which cannot be precisely forecast and remains in the event "unexplained". It is enough if he ought reasonably to anticipate that injury or damage of some sort to a workman was likely to result, and in applying his foresight to this question he cannot leave out of account the tendency of factory operatives to commit acts of inadvertence such as those which occupied so much of the attention of the court in *Caswell's* case (47). As Lord Atkin pointed out (48), Caswell's own injury would not have occurred without an act of inadvertence on his part the nature of which could only be conjectured.

I would add a few sentences on two other points: (1.) on the question whether the workman was guilty of contributory negligence; and (2.) on the question whether the decision in *In re Polemis and Furness, Withy & Co. Ld.* (49) is still binding on this court.

(1.) The chain of causation would, of course, in this case have been broken or impaired if the workman's act had gone beyond inadvertence and had amounted to an act of contributory negligence: broken, if occurring before the Law Reform (Contributory Negligence) Act, 1945; impaired, to the extent of compelling an apportionment of the damage, if occurring after that enactment came into force. The judge has, however, found that the act was one of mere inadvertence, not rising to the level of contributory negligence. The question is one of fact and degree—a typical jury point. "The jury", said Lord Wright in *Caswell's* case (50), "have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases and where negligence begins." I can see no justification for disturbing the conclusion at which on this issue of fact the judge, performing the functions of a jury, has arrived.

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(47) [1940] A. C. 152.
(48) Ibid. 163.
(49) [1921] 3 K. B. 560.
(50) [1940] A. C. 152, 176.

(2.) Nor do I consider that the decision in *In re Polemis and Furness, Withy & Co. Ld.* (51) has been overruled, or its binding character, so far as this court is concerned, in any degree shaken. The utmost that can be said is that certain of the Lords of Appeal in Ordinary have reserved the right to reconsider it if and when, before the House of Lords, its authoritative character should come directly in issue. Meanwhile it stands. It has been suggested that decisions such as *Donoghue* v. *Stevenson* (52) and *Bourhill* v. *Young* (53) have in some way undermined it. I respectfully dissent. The issue in both these cases was, " Did the defendant owe a duty of care " to the plaintiff? ", not " Did the damage suffered by the plain- " tiff result directly from a breach of that duty of care? " If in either case a duty existed on the part of the defendant, no one doubted that the indisposition of the plaintiff in *Donoghue* v. *Stevenson* (54) was directly caused by drinking contaminated ginger beer, or that the miscarriage of the plaintiff in *Bourhill* v. *Young* (55) was directly caused by the conduct on the high road of the defendant in that case. In my view *In re Polemis and Furness, Withy & Co. Ld.* (56) has not been overruled, and this is all that it is necessary or proper to say here.

I have thought it right, out of respect for the closely-knit reasoning of a judge from whom if ever one dissents one does so with great diffidence, to deal with his reasoning in some detail, though I hope not at excessive length. My conclusion is that the claim is entitled to succeed at common law as well as under the Factories Act, 1937, and I agree that the appeal should be allowed.

BIRKETT, L.J. I have had the advantage of reading the two judgments which have just been delivered. I agree with them, both in their reasoning and in their conclusions.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Rowley Ashworth & Co.; Gascoin & Co.*

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(51) [1921] 3 K. B. 560.
(52) [1932] A. C. 562.
(53) [1943] A. C. 92.
(54) [1932] A. C. 562.
(55) [1943] A. C. 92.
(56) [1921] 3 K. B. 560.

1951
June 7, 8.

Finnemore, J.

TIGER AND ANOTHER *v.* BARCLAYS BANK LD.

[1950 T. 1771]

Executors and Administrators—Bank appointed administrator pendente lite—Possession of documents relating to estate—Compromise agreement—Renunciation of probate by bank—Demand by newly appointed administrators for possession of documents—Bank's refusal to deliver up documents except against formal release—Obligation on bank to give possession unconditionally—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 5 *and* 7.

A testator died in 1943 leaving a will and codicil in which a bank were named as executors. In 1946 the bank became administrators pendente lite of the will and codicil, and as such were in possession of all the documents and papers relating to the estate. In November, 1948, an action concerning the will which the plaintiffs, the present administrators, brought in the Probate Division, and to which the bank were parties, was adjourned for settlement; and eventually, in November, 1949, the parties agreed terms of compromise which were reduced to writing and became an order of the court. By that compromise agreement the bank agreed to renounce probate of the will, which they did, and the plaintiffs undertook to apply for a grant of letters of administration with the will and codicil annexed. This was granted in January, 1950. Cl. 17 of the compromise provided that all parties to it would use their best endeavours to carry out its terms with the utmost dispatch.

The plaintiffs subsequently demanded from the bank possession of all the documents concerning the estate which were in their possession or power, claiming to be unconditionally entitled to them both by virtue of an implied term to that effect in the compromise agreement, and by general law. The bank refused to hand over the documents to the plaintiffs except against a formal release from all liability in respect of the estate, but the plaintiffs would not agree to that.

In the plaintiffs' action for possession of the documents:—

Held, (1.) that, in view of cl. 17 and the lack of any express provision in the compromise for a formal release, although the question had been discussed in the negotiations between the parties, the plaintiffs were entitled to the documents without the necessity of giving a formal release to the bank; and (2.) that the plaintiffs were also so entitled, although the compromise agreement had modified some of the trusts under the will, because the original trusts created by the will had not been thereby brought to an end and new ones established. The plaintiffs were accordingly still acting as the administrators of the will and as such were entitled to possession of all documents necessary for the proper administration of the estate without being called on to give the bank a formal release.

ACTION.

A testator died in 1943 leaving a will dated October 14, 1942, and a codicil, in which the defendants, Barclays Bank Ld., were named as executors. The bank later became administrators pendente lite and as such had possession of all the documents and papers relating to the estate. In November, 1948, an action which the plaintiffs, Eduard Max Tiger and Klara Haider, brought in the Probate Division, and to which the bank were parties, was adjourned for settlement; and during the discussions which then took place the question of giving the bank a formal release from all liability in respect of the estate was discussed. Eventually on November 11, 1949, the parties entered into terms of compromise which were put into writing and became an order of the court. By that compromise agreement the bank agreed to renounce probate of the will, which they did, and the plaintiffs undertook to apply for a grant of letters of administration with the will and codicil annexed. They were granted letters of administration on January 26, 1950. By clause 17 of the compromise the parties to it agreed to use their best endeavours to carry out the terms with the utmost dispatch.

The plaintiffs, as administrators of the estate, claimed from the bank the delivery up to them of all documents relating to the estate which were in the possession or power of the bank, and damages for breach of contract. They alleged that it was an implied term of the compromise that the bank should hand over to them all the documents relating to the estate; and, further, that, apart from that implied term, the bank were not entitled to impose any condition on their willingness to deliver up the documents.

The bank alleged that they had at all times been ready and willing to deliver the documents up to the plaintiffs against a formal release and discharge from all liability in respect of the estate, which release they claimed that the plaintiffs had wrongfully refused to give them. They further alleged that any implied term for the delivery up of the documents was subject to their being given a formal release by the plaintiffs.

J. F. Platts-Mills for the plaintiffs, the administrators. It was an implied term of the compromise agreement that the bank should hand over to the administrators all the documents in their possession which related to the estate. That implied term was not fettered by any condition as to the giving of a formal release to the bank. The question of a release was discussed in the negotiations of 1948, but no mention of it was made in the actual agreement. By cl. 17 of the compromise the bank agreed to use their best endeavours to carry out its terms with the utmost dispatch, but that could not be done properly unless the relevant documents were handed over to the administrators.

Quite apart from the existence of any implied term, the plaintiffs, as administrators of the will, are entitled by law to any documents of the estate in the possession or power of the bank: ss. 5 and 7 of the Administration of Estates Act, 1925. The authorities also show that the courts are slow to hold that an executor or trustee can insist on a release: *In re Cater's Trusts* (*No.* 2) (1) and *Cobbett* v. *Clutton* (2). Further, if every trustee were entitled as of right to a formal release there would be no necessity for s. 61 of the Trustee Act, 1925. [He also referred to *In the Goods of Russell* (3); Halsbury's Laws of England (2nd ed.), vol. 33, p. 214; and Lewin on Trusts (15th ed.), p. 266.]

I. J. Lindner for the defendants, the bank. The court will only imply a term on the lines suggested by the plaintiffs if the compromise without such a term fails to give efficacy to the agreement between the parties: see *The Moorcock* (4). It is unnecessary to imply such a term here. The bank are entitled to a formal release since, although they are no longer the administrators, they are accountable to the beneficiaries. *Cobbett* v. *Clutton* (5) and *In re Cater's Trusts* (*No.* 2) (6) are not in point. In *Cobbett* v. *Clutton* (5) the person in possession of the box and its contents had no possible claim to them. In *In re Cater's Trusts* (6) there was a mere change of trustees.

The compromise agreement of 1949 substituted new trusts for those created by the will. The acts of the beneficiaries in making the agreement, whereby the provisions of the will were modified, brought the trusts established by the will to an end and created new ones, and the bank are therefore entitled to a formal release from all obligations in respect of the estate: see Underhill's Law of Trusts and Trustees (10th ed.), p. 505.

Platts-Mills replied.

FINNEMORE, J., stated the facts as set out above and continued:—The short—I hesitate to say simple—issue between the

(1) (1858) 25 Beav. 366.
(2) (1826) 2 C. & P. 471.
(3) (1869) L. R. 1 P. & M. 634.
(4) (1889) 14 P. D. 64.
(5) (1826) 2 C. & P. 471.
(6) 25 Beav. 366.

plaintiffs and the defendants is this: the plaintiffs as the administrators have demanded from the defendants all the documents and papers relating to this estate. One would think that in the ordinary course of events it was meant to stop there, and, that the plaintiffs would quite plainly be entitled to the documents: it is their duty, quite apart from their right, to administer the estate. But the defendants, who had necessarily had to meddle in the estate, were in possession of numbers of documents which are necessary for the administration of the estate, and normally one would think it would follow that the plaintiffs would be entitled to the documents and the defendants would be bound to hand them over to the plaintiffs. There is no suggestion that the defendants want to be obstructive: they are merely anxious to protect their own position. Obviously, when they have dealt with this estate for a number of years, they may wish, before handing over all the papers to somebody else, to feel that the matter is complete, that they can finally end their connexion with the estate and that nobody can in the future raise any point against them.

The only defence raised was that, while the defendants in effect admit that they possess these documents, they claim that they are quite willing to hand them over against a formal release and discharge from all liability in respect of the estate. The plaintiffs claim that they are not entitled to such a release.

Mr. Platts-Mills put his case on two grounds. First, he contended that it was an implied term of the compromise that the bank would do this. Where there is an implied term it is sometimes, I think, liable to be misunderstood. I think that what Mr. Platts-Mills meant was that in effect this term was in the terms of compromise, and that what the parties put in that compromise necessarily involved that the defendants, who were parties to it, should hand over these documents. Otherwise, the compromise would never be properly carried out and the administrators would never administer the estate properly. I am not sure that that is seriously dissented from by Mr. Lindner, subject to the right which he puts forward to have this final and formal release.

On the first point, did the defendants in effect agree that they would hand over the necessary documents without demanding, first of all this formal release? No evidence has been called, because there is no dispute about the facts, and Mr. Platts-Mills has told me, and I at once accept it, that this question of release by the bank was one of the very matters which was under discussion in the course of the settlement, and that in 1948 the bank were holding out for a term that they should receive a formal release. I do not know what negotiations took place, but it is really a matter on which there is no issue. When the terms of compromise in 1949 were agreed to there was no such term, and that, in itself, suggests that this final compromise was entered into by all parties, including the bank, knowing quite well that this question of a release to the bank was not a term of the compromise.

It is further pointed out that by cl. 17 the bank as well as the other parties agreed to use their best endeavours to carry out these terms with the utmost dispatch. It seems to me plain that that really cannot be done properly unless the documents relating to the estate are in fact handed over to the people who are now the administrators. When one reads the whole of this compromise agreement, and remembers that this release term was in the original suggestions of 1948, but was left out of the final agreement in 1949, the conclusion seems almost inevitable that this agreement was to be entered into without any such term of release. I think that the plaintiffs are entitled, in view of this agreement and negotiations, to claim the papers and to claim them without being called upon as a condition to give the defendants a formal release.

That appears to have been the view taken by the defendants themselves. It seems to me from the correspondence to be quite clear that, for a considerable time anyhow, they took that view. [His Lordship referred to certain passages in the correspondence between the parties' solicitors and continued:] I think that that shows plainly that at the time of the compromise agreement in November, 1949, both sides understood that if and when, as they were bound to, the present plaintiffs took out letters of administration, they would be entitled to receive from the defendants the documents relating to the estate.

Mr. Platts-Mills raised a second point which has led to a very interesting argument. He said that, quite apart from any agreement at all, the bank have no answer to this claim. The bank are in possession of the documents which in fact now belong to the administrators of the estate. They are no longer executors: they renounced completely and have no right at all as against the present administrators to make any terms for the handing over of the documents. Mr. Platts-Mills referred to the Administration of Estates Act, 1925, ss. 5 and 7, and said that once the bank renounced they had no right whatever to make any claim

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whatever against the present administrators. He cited s. 5, which provides that where a person appointed executor by a will renounces probate of the will, his rights in respect of the executorship "shall wholly cease, and the representation to the "testator and the administration of his real and personal estate "shall devolve and be committed in like manner as if that person "had not been appointed executor". He also referred to s. 7, which concerns what is called the chain of representation to the estate, and which provides that every person in the chain of representation has the same rights in respect of the estate as the original executor would have had if living and is to the extent of the estate which has come to his hands answerable as if he were the original executor. He contended that as the bank have renounced, they are in effect complete strangers to the administration of the estate and have no rights against the present administrators to demand anything from them; and that all they have to do is to hand over the property which belongs to the estate. The defendants claim to be entitled to be protected, and that, before they hand over to other administrators, they are entitled to a formal release.

A number of cases on the point have been cited and several passages read from Lewin on Trusts, Underhill's Law of Trusts and Trustees (10th ed.), and Halsbury's Laws of England (2nd ed.), vol. 33. I do not think that Mr. Lindner disagrees with the proposition that, where a trustee hands over to another trustee, he is not entitled to a formal release from that trusteeship. Mr. Platts-Mills goes rather further: he submits that it is a doubtful proposition whether a trustee in the circumstances would be entitled to a release even if the whole trust were being wound-up altogether; but, in any event, the only person who can give, or is called upon to give, a formal release to a trustee is a beneficiary when the whole trust is brought to an end.

One can see some of the reasons for that. The present administrators act not only for themselves, but for anyone who may be in this will as a beneficiary, and if they gave a formal release to the bank and it happened that the bank had done something which was legally wrong, then the present administrators might well be in a very difficult position in regard to a beneficiary who claimed that his rights had been damaged.

In re Cater's Trusts (*No.* 2) (7) and *Cobbett* v. *Clutton* (8) show as a general principle that courts are rather slow to hold

(7) 25 Beav. 366.

(8) 2 C. & P. 471.

that a formal release can be insisted on; and, as I say, I thought that Mr. Lindner more or less accepted the position that he must show that there was really an end of the trust under which the bank acted, that in effect there was a new trust now in existence, and that accordingly the bank were entitled to the release for which they asked. He said that the trusts of the bank had been brought to an end by the acts of the beneficiaries in making the compromise agreement, and that therefore the release demanded was like one demanded from the beneficiaries on the completion of the trust. Mr. Lindner said that there was no direct authority on that; but he said that this was a rather exceptional case and that the proper view to take of it is that the trust under which the bank was acting had been completely finished and a new one has come into existence, and, therefore, that the bank is entitled to its release.

I do not feel able to accept that view. I do not think that it can be said that because of these terms of compromise the trust under the will had come to an end and some kind of new trust under the terms of compromise had come into existence. I think it plain that the present plaintiffs are acting under the will: the terms of compromise say so, and the plaintiffs received letters of administration with this will and its codicil of 1942 annexed, a term of the agreement being that they would undertake to obtain that grant. It is quite true that in the compromise various terms are agreed as among the beneficiaries and other parties to the agreement, and it may be that some of the terms of the will have been modified. But the trust is still the trust under the will. It is the will which the administrators are called upon to administer, albeit the terms of compromise are matters which in fact may affect some of the provisions of the will; and I think that it is unreal to say that at the time when this compromise was made the original trust had come to an end and a new trust had come into being. That being so, it is hardly open to doubt, in view of the authorities, that the defendants are not entitled to demand a release from the plaintiffs as a condition of handing over the documents relating to the estate.

That is the only defence put forward. It is one of considerable substance, but I think that it fails on both grounds, on the ground of the agreement itself and because of the general law quite outside that agreement. The fact that the bank must hand over these documents does not deprive them of any rights they may have; but I think that, both by the agreement and apart from the agreement by the ordinary law, the plaintiffs are entitled to these documents. I do not think that the defence which has been put forward that the plaintiffs must first give them a formal release is a good one. There will be an order that the defendants do hand over the documents; and 40*s*. nominal damages for breach of contract through their detention.

Judgment for the plaintiffs.

Solicitors: *Kennedy, Genese & Co.; Reed & Reed.*

S. C.

BUTLER *v.* MOUNTVIEW ESTATES LD.

1951
Feb. 21, 22.

Danckwerts, J.

[1949 B. 4953]

Lease—Assignment—Assignor conveying as "beneficial owner"—Implied covenants—Nature of—Rectification—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 76; *Sch. II, Pt. II.*

The plaintiff purchased from the defendants, at an auction sale, for the unexpired residue of their terms, three leasehold properties which were sold subject to the Law Society's Conditions of Sale (1934 ed.) so far as not varied by or inconsistent with the special conditions.

In respect of two of the properties the contracts of sale incorporated condition 17 of the Law Society's Conditions, and the remaining property incorporated a special condition in similar terms.

Condition 17 provided: "A purchaser shall be deemed to purchase with full notice of the actual state and condition of the property and shall take the same as it stands".

The particulars of sale stated that the vendors sold as beneficial owners. The leases of the three properties contained the usual repairing covenants, which had not been fully observed at the date of sale. Before the auction the purchaser inspected the properties and was aware of their condition. The landlord accepted from the purchaser rent falling due after the assignments.

The purchaser brought an action for damages against the vendors, alleging that they, conveying as beneficial owners, were in breach of the covenants contained in the assignments by virtue of s. 76 of, and Part II of Sch. II to, the Law of Property Act, 1925, by reason of the non-observance of the repairing covenants.

Held, (1.) that the implied covenant—"that the lease . . . has "in nowise become void or voidable"—was a covenant of title only,

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[Reported by J. A. Griffiths, Esq., Barrister-at-Law.]

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and did not contain an obligation on the part of vendors with regard to the condition or quality of the property conveyed; that accordingly, although the leases were voidable at the date of the assignments by virtue of the non-observance of the repairing covenants, subsequent acceptance of rent by the landlord had cured that defect of title; and that therefore the plaintiff had no right of action in respect of that defect at the time when he issued his writ;

(2.) that the statutory implied covenant—"that . . . all the "covenants . . . contained in the lease . . . have been . . . observed "and performed up to the time of conveyance"—was referable to the covenant for title implied by the words "beneficial owner", and was in the nature of a warranty that all the covenants and conditions in the lease had been duly performed up to the date of assignment; that, although the landlord had waived his right of re-entry by his acceptance of rent, he still had a right of action for damages which could be enforced against the purchaser; and that accordingly the purchaser had prima facie a right of action against the vendors for damages in respect of the breach immediately on the execution of the assignments, his knowledge of the breach being immaterial as the covenant was unqualified; but

(3.) that, since, if the purchaser's claim were to succeed, he would be receiving that which was plainly contrary to the bargain between the parties, the vendors were entitled, despite the absence of any counterclaim, to rectification of the conveyances to exclude any liability for breaches of the repairing covenants subsisting at the time of the assignments.

ACTION tried by Danckwerts, J., sitting as an additional judge of the King's Bench Division.

At an auction sale held on March 1, 1949, the plaintiff purchased from the defendant vendors three leasehold properties delineated in the particulars of sale as lots 8, 21 and 22. The properties were sold subject to special conditions and to the Law Society's Conditions of Sale (1934 ed.) so far as not varied by or inconsistent with the special conditions.

Before the auction the purchaser visited and inspected the properties, which he subsequently bought, and at the auction the contracts were duly signed on the particulars and conditions of sale. In respect of each lot there was a special condition that the "vendors sell as beneficial owner"; and in respect of lot 8 there was a special condition that "the purchaser shall be deemed "to have notice of the actual state and condition of the property "and shall take the property as it is. If the vendor shall incur "or become liable for expenditure upon the property whether by "virtue of any requirement made by the local authority or by a "lessor or otherwise the purchaser shall take the property subject "to such requirements and if before the completion of the purchase the vendor shall expend any money in complying with "such requirements and/or effecting essential repairs the purchaser shall on completion of the purchase repay to the vendor "the amount so expended by him and in any case indemnify the "vendor in respect of loss".

In respect of lots 21 and 22, the contracts incorporated condition 17 of the Law Society's Conditions of Sale, which provided: "A purchaser shall be deemed to purchase with full notice of the "actual state and condition of the property, whether as to "quantity, state of repair, means of access, enjoyment of light "and air or otherwise howsoever, and shall take the same as it "stands".

The properties comprised in the lots were held on long leases, the unexpired terms of which were in the neighbourhood of twenty years. Each lease contained the usual repairing covenants and condition for re-entry.

When the transaction passed into the hands of the parties' respective solicitors requisitions were delivered on behalf of the purchaser which were answered by the vendors' solicitors. The first requisition in each case was: "Have all the covenants and "conditions contained in the lease under which the property is "held been performed or observed? The receipt for ground rent "due on the last rent day immediately before the day of completion, as well as the receipt for the last fire insurance premium, "must be produced". In respect of lot 8, the answer was: "The vendors are not aware of any breach. The last receipt will "be produced". In respect of lots 21 and 22, the answer was: "The vendor is not aware of any breach, and the last receipt "when produced must be accepted as conclusive evidence". The last receipts for rent were eventually produced as requested. The second requisition in each case was: "Has any notice to "repair or of the breach of any of the other covenants contained "in the lease been served by the lessor? Anything necessary to "be done to comply with any such notice must be executed before "completion at the vendors' expense". In respect of lot 8 the answer was: "The vendors are not aware of any". In respect of lots 21 and 22, the answer was: "Not to the vendors' "knowledge".

The transaction having proceeded to completion, assignments of the leasehold premises were executed by the vendors to the purchaser in the case of lot 8 on May 6, 1949, and, in the case of lots 21 and 22, on June 3, 1949. In each case the conveyance contained an assignment by the vendors as beneficial owners of the properties, " To hold the same unto the purchaser henceforth " for all the residue now unexpired of the said term of ninety-nine " years granted by the said lease subject henceforth to the payment of the rent and the performance and observance on the " part of the lessee of the covenants and conditions by and in the " same lease reserved and contained but discharged from all " principal moneys . . .".

At the time of the assignments to the plaintiff in May and June, 1949, rent was outstanding which was payable on June 24, 1949, and it was a fact that the covenants in the leases had not been complied with in full because the properties were not in a full state of repair. After the assignments of the leases to the purchaser rent was paid by him to and accepted by the landlord.

In September, 1949, the writ in the action was issued, the purchaser claiming from the vendors damages, and alleging that they, conveying as beneficial owners, were in breach of the covenants contained in the assignments by virtue of s. 76 of, and Pt. II of Sch. II to, the Law of Property Act, 1925 (1).

Mark Gore for the plaintiff purchaser.

Geoffrey Cross, K.C., and *R. Cozens-Hardy Horne* for the defendant vendors.

The arguments sufficiently appear from the judgment.

DANCKWERTS, J. [having stated the facts]. The purchaser claims damages from the vendors for breach of the implied covenants of title contained in the assignments, that is, breach of the covenants contained in Pt. II of Sch. II to the Law of

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(1) In pursuance of s. 76 of the Law of Property Act, 1925, Pt. II of the Second Schedule provides :—

" FURTHER COVENANT IMPLIED IN A " CONVEYANCE OF LEASEHOLD PROPERTY FOR VALUABLE CONSIDERATION, " OTHER THAN A MORTGAGE, BY A PERSON WHO CONVEYS AND IS EXPRESSED " TO CONVEY AS BENEFICIAL OWNER. " [*Heading.*]

" That, notwithstanding anything " by the person who so conveys, or " any one through whom he derives " title, otherwise than by purchase " for value, made, done, executed, or " omitted, or knowingly suffered, the " lease or grant creating the term or " estate for which the land is conveyed is, at the time of conveyance, " a good, valid, and effectual lease or " grant of the property conveyed, and " is in full force, unforfeited, unsurrendered, and has in nowise become " void or voidable, and that, notwithstanding anything as aforesaid, all " the rents reserved by, and all the " covenants, conditions, and agreements contained in, the lease or " grant, and on the part of the lessee " or grantee and the persons deriving " title under him to be paid, observed, " and performed, have been paid, " observed and performed up to the " time of conveyance . . .".

Property Act, 1925. It is said that the breaches are twofold: the leases had become void or voidable, and it was not the fact that all the covenants, conditions and agreements contained in the leases had been observed and performed up to the time of conveyance. Accordingly, it is said, the purchaser is entitled to damages from the vendors and to recover from them the cost of putting the premises into a proper state of repair as at the date of the assignments, in order to comply with the terms of the leases.

The first point is whether that contention represents the bargain between the parties. In my opinion, it does not. It is plain, from condition 17 (5.) of the Law Society's Conditions of Sale, and a fortiori from the special conditions contained in the conditions relating to lot 8, that the bargain between the parties was that the purchaser should take the properties in the condition in which they were at the date of purchase; that he should be responsible for any further repairs that were required in respect of the properties; and that the vendors were not to be responsible for those repairs. The purchaser bought the properties in an unrepaired state and, therefore, prima facie he would have no right to complain if, afterwards, in order to comply with the covenants contained in the leases, he had to expend moneys to put the properties into a proper state of repair. I am satisfied that if the vendors' solicitors had been alive to the point and had asked, in order to put the matter in the position required by the parties' bargain, for the insertion of the appropriate provision limiting the implied covenants of title, they would have been entitled to demand such a limitation. It would, for instance, have been perfectly correct for them to ask for the insertion in the assignments of a provision similar to that contained in Key and Elphinstone's Precedents in Conveyancing (14th ed.), vol. 1, p. 593.

The side-note to form 10 is: "Proviso restricting liability on "sale of leaseholds subject to broken covenants". "10. PRO-"VIDED ALWAYS, and it is hereby agreed, that the covenants "which are implied by reason of the said 'A' hereby assigning "and being expressed to assign as beneficial owner, shall not be "deemed to imply that either of the covenants on the part of "the lessee contained in the recited lease for painting or repairs "to be executed upon the premises has been performed"—with such necessary alterations or additions as were thought appropriate in order to cover the provisions of the leases in the present case.

Accordingly, if the bargain between the parties had been carried out in the way which might have been anticipated, the implied covenants for title would have been so limited that the purchaser could not have pursued his claim in this action. But I have to consider the situation as it is in the documents before me, where the assignments are unqualified as regards the words "as beneficial owner".

It has been argued by Mr. Cross, on behalf of the vendors, that Pt. II of Sch. II to the Law of Property Act, 1925, is simply concerned with a covenant of title and does not contain an obligation on the part of the assignors with regard to the condition or quality of the property or properties assigned. He contended that although the covenants had been broken at the dates of the assignments, and that the leases were in fact voidable by the landlord if he had chosen to exercise his right of re-entry, that defect has been cured by the landlord's subsequent acceptance of rent, which amounted to a waiver of his right of re-entry in respect of any breach of covenant existing before its acceptance. That, so far as it goes, seems to me to be a correct contention. The landlord's right of re-entry for any breaches of covenant which may have been committed by the vendors, the assignors, has long since gone, and although the leases might have been voidable once, they are not voidable now.

On the other hand, it is claimed that at the dates of the assignments the leases were voidable and that consequently there were at those dates breaches of the covenant for title to that extent. It is true that the right of re-entry has since been waived, but if the writ had been issued immediately after the dates of the assignments then, on the terms of the assignments, there would have been a right of action for damages against the vendors in this respect. As that defect of title has been cured, I do not see how there was any right of action with regard to it when the purchaser issued his writ on September 30, 1949; and there could never have been any damage in respect of that particular breach of the covenants of title.

The rest of the implied covenants [after the words "void or "voidable"] present more difficulty for the vendors, because they are a warranty, or something of that nature, that all the covenants, conditions and agreements contained in the lease—and, on the part of the grantee, that is the purchaser, to be observed and performed—have been observed and performed up to the time of conveyance. Those obligations had not in fact been performed, and the landlord, even if he had waived his right of re-entry, still had a right of action for damages in respect of the breaches which existed at the time of the assignments, as well as in respect of the subsequent breaches by failure of the purchaser, as assignee or tenant, to put the premises in repair in accordance with the terms of the leases.

Mr. Cross has argued that the latter part of the provision in Sch. II to the Law of Property Act, 1925, is to be read as part of and controlled by the earlier part, and that the whole matter is not directed to the condition of the premises as a physical entity, but to the matter of the assignor's estate; and that it is a covenant for title and nothing more. That argument, it seems to me, would have had more force if the provision in the Act had been expressed the other way round, that is to say, if the latter part had preceded the earlier part; in other words, if it read something like this: "All the covenants, conditions and agree-"ments have been observed and performed" and by inference, therefore, the lease was in "nowise void or voidable". But it is put the other way round, and it seems to me that Mr. Cross's argument in this respect cannot succeed, and that Mr. Gore is right.

It was contended on behalf of the purchaser that this refers to another branch of the covenant for title, the covenant implied by the words "beneficial owner", and that there is a covenant by the assignor that, at the date of the assignment, all the covenants and conditions in the lease have been duly performed up to the date of the assignment. Accordingly, it seems to me that there is, and was, a breach of covenant committed by the vendors during their period of ownership of the properties for which the landlord would have a right of action.

Mr. Cross also contended that a covenant of this kind was purely a covenant of indemnity and therefore that, until the landlord had begun a claim against the assignee, the latter had no right of action against his assignor. The provision in the case of the implied covenant on the part of the assignee (contained in Pt. IX of Sch. II) is really a covenant of indemnity: see *Harris* v. *Boots Cash Chemists (Southern) Ld.* (2).

It seems to me that, as regards the covenant for title, a breach had occurred at the time of the conveyance or assignment. Accordingly, the period of limitation prescribed by the Limitation Act, 1939, would begin to run at that date and, even though the landlord had made no claim, a right of action as between the

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(2) [1904] 2 Ch. 376.

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assignee and the assignors would arise immediately upon the execution of the assignment of the form in question.

It is also established by several cases, of which a good example is *Page* v. *Midland Railway Co.* (3), that the knowledge of the assignee of the defect in the assignor's title does not limit his right of action, and indeed is not material if there is an unqualified covenant of title contained in the conveyance. The purchaser's knowledge of the fact that the property was not in full repair is prima facie no answer to the claim under the implied covenants for title.

There was therefore a breach of the assignors' obligation under the covenants which gave rise to a right of action immediately after the execution of the assignments; and, prima facie, it would seem that the measure of damages for such a breach is the difference in value between the property as it is and as it would have been if the covenants had been duly performed at the date of the assignment: see *Eastwood* v. *Ashton* (4), a decision of Sargant, J. (5). That may, prima facie, be the measure of damages, but it is subject to reduction by a number of factors. Mr. Cross argued that one ought to take into consideration the fact that the landlord had taken no steps to forfeit the lease, and he maintained that the damages were thereby reduced to nothing. He also contended that in assessing the damages one must take into consideration all the factors with regard to the deterioration of the demised premises, and any other factors which may be relevant, including statutory provisions to that effect, which make it difficult for a landlord to recover damages for a failure to put the premises in repair. It seems to me that one must take the situation as it is: the landlord must be taken to be ready to enforce his legal rights. Prima facie, on the terms of these assignments and by the implied covenants, it seems to me that the purchaser would have a right of action against the vendors for damages.

That result is plainly contrary to what was agreed between the parties. I have already referred to the effect of the conditions of sale. The situation being that the purchaser has bought property which was not fully in repair, and has subjected himself to the liability of putting it into repair, in accordance with the terms of the leases, he could not compel the vendors, if the objection had been raised before completion, to put the property in repair: see *Lockharts* v. *Bernard Rosen & Co.* (6). If I had to award damages to the purchaser in this action, I would have to do it contrary to the intention of the parties in the bargain which they had concluded. In those circumstances, Mr. Cross contended that, if necessary, the assignments should be rectified by limiting the implied covenants in the way which I mentioned by reference to Key and Elphinstone's Precedents in Conveyancing.

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(3) [1894] 1 Ch. 11.

(4) [1913] 2 Ch. 39, 54, 55.

(5) Reversed on appeal [1914] 1 Ch. 68, but restored by the House of Lords [1915] A. C. 900.

No question of counterclaim was in fact raised in the defence, which also failed to refer to the waiver of the landlord's right of re-entry by his acceptance of rent; but under s. 40 of the Judicature Act of 1925 I am required to "take notice of all "equitable estates, titles and rights, and all equitable duties and "liabilities appearing incidentally in the course of any cause or "matter, in the same manner in which the Court of Chancery "would formerly have taken notice of those matters in any suit "or proceeding duly instituted therein".

In *Borrowes* v. *Delaney* (7) a defective lease was rectified although there was no counterclaim to rectify. If a point is to be taken that a document should be rectified, it should normally be raised in the pleadings. That has not been done in this case, but, having regard to the circumstances, and particularly to the fact that, if the plaintiff's claim were to succeed, he would be getting something to which he would have no right whatever, I accede to the submission on behalf of the defendants. Therefore I propose to direct the rectification of the assignments by the addition of a proviso on the lines of the precedents of Key and Elphinstone (14th ed.), vol. 1, p. 593, with such modifications as may be required by the circumstances of the present case.

There is one further matter which is material. The purchaser has sold the three leasehold properties in question to somebody else, and if that person has purchased for value but without notice of the claim made by the vendors to rectify, the rectification of the assignments in question should be limited in such a way as not to affect the purchaser in those circumstances. Accordingly, some limitation in that way must be inserted in the alteration.

Judgment for defendants.

Solicitors: *Rance & Co.; Staddon, Pyke & Barnes.*

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(6) [1922] 1 Ch. 433, 437.

(7) (1889) 24 L. R. Ir. 503.

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[1951 B. 953]

Husband and Wife—Deed—Provision for maintenance for wife and child—Wife not to apply for maintenance for herself and child—Decree for dissolution of marriage subsequently obtained by wife—Application by wife for maintenance under deed—Deed contrary to public policy—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 190, *sub-s.* 1; *s.* 193, *sub-s.* 1.

A husband and wife entered into a deed in anticipation of dissolution of marriage, whereby the husband covenanted to make financial provision for the wife and their younger child in consideration of the wife's not proceeding with her prayers for alimony pending suit, maintenance for herself and her younger child, consenting to those prayers being dismissed, and not presenting any further petition for maintenance. The wife subsequently obtained a decree of divorce, and was granted custody of the children of the marriage. In an action by the wife to recover sums alleged to be due under the deed:—

Held, that the wife could not by covenant exclude the jurisdiction of the court as it was contrary to public policy for a wife, who had the custody of a child and who was therefore the natural person to take such steps as might be necessary to secure its adequate maintenance, to promise not to invoke the jurisdiction of the court with regard to that matter. Accordingly, the deed was void and the action not maintainable.

ACTION.

On August 10, 1948, the plaintiff presented a petition for dissolution of marriage. She asked for custody of the two sons of the marriage, alimony pending suit, maintenance for the younger son, and maintenance and secured provision for herself. The petition was not defended.

On November 24, 1948, before pronouncement of the decree, the defendant husband entered into a deed whereby he agreed to make financial provision for the plaintiff and the younger son in consideration of the plaintiff's not proceeding with the prayers for maintenance, consenting to those prayers being dismissed, and not presenting any further petition for maintenance.

By cl. 6 of the deed the defendant covenanted to pay to the plaintiff an annuity of 750*l*. after deduction of tax. By cl. 7 the defendant covenanted with the plaintiff and with the trustees of the deed that so long as the younger son was alive and under

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[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

eighteen years he would pay to the trustees an annuity of 300*l*. after deduction of tax; and that after the younger son attained eighteen years he would make certain further payments for his further education. The trustees agreed to pay the annuity of 300*l*. to the plaintiff as long as she was alive, to be applied by her towards the maintenance and education of the younger son.

By cl. 10 the plaintiff covenanted with the defendant: " (*a*) to " accept the provision hereby made for her and the younger son " in full satisfaction of all rights and claims of [the plaintiff] and " her said two children or any of them against [the defendant] " in respect of alimony pending suit maintenance of her said two " children or either of them maintenance of herself or secured " provision for herself or any like relief whether under s. 190 of " the Supreme Court of Judicature Act, 1925 (1), or s. 10 of " the Matrimonial Causes Act, 1937, or otherwise howsoever. " (*b*) Not to proceed further with the prayer in her said petition " that [the defendant] do pay to [the plaintiff] alimony pending " suit maintenance of the younger son maintenance and a secured " provision and to consent to such prayer being dismissed. (*c*) Not " to institute enter present or proceed with nor to procure suggest " assist or encourage directly or indirectly either in her own right " or on behalf of her said two children or either of them maintenance of herself or secured provision for herself or any like " relief ". The plaintiff also covenanted to provide out of the annuities or otherwise for the maintenance and education of the younger son during his infancy.

By cl. 14 the deed was made revocable by the husband in the event of there not being a decree absolute.

On the same day, November 24, 1948, the registrar, on learning of the deed, dismissed the application for maintenance of the plaintiff and the younger child contained in the petition. On December 6, 1948, the decree nisi was granted. The decree absolute followed.

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(1) The Supreme Court of Judicature (Consolidation) Act, 1925, s. 190, sub-s. 1: " The court may, if it thinks " fit, on any decree for divorce or " nullity of marriage, order that the " husband shall, to the satisfaction of " the court, secure to the wife such " gross sum of money or annual sum " of money for any term, not exceeding her life, as having regard to her " fortune, if any, to the ability of her " husband and to the conduct of the " parties, the court may deem to be " reasonable . . .".

Section 193, sub-s. 1: " In any proceedings for divorce or nullity of " marriage or judicial separation, the " court may from time to time, either " before or by or after the final decree, " make such provision as appears just " with respect to the custody, maintenance and education of the children . . .".

After the execution of the deed the defendant made regular payments in accordance with its provisions, until financial difficulties rendered him unable to keep up the payments. The plaintiff brought an action claiming 262*l*. 10*s*., being instalments due on December 25, 1950, of the two annuities contained in the deed.

By his defence the defendant contended that the deed contained a clause seeking to oust the jurisdiction of the court.

Fairweather for the plaintiff.

Brodrick for the defendant.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

April 27. DEVLIN, J., read the following judgment:—This is a claim by the plaintiff against her former husband for 262*l*. 10*s*., being the instalments due on December 25, 1950, of two annuities alleged to be payable to her under a deed dated November 24, 1948. The defence is that the deed is void because it contains a clause seeking to oust the jurisdiction of the court.

[His Lordship stated the facts and continued:] In *Hyman* v. *Hyman* (2) a wife covenanted in a separation deed made during her marriage that she would not institute any action or take any proceedings to compel her husband to allow her maintenance beyond the sums provided for in the deed. Later she was given grounds for divorce, obtained a decree nisi and filed a petition for permanent maintenance. The appellant set up the provisions of the deed. The House of Lords held that the power conferred by s. 190 of the Judicature Act, 1925, upon the court to make a proper provision for the wife on the dissolution of her marriage, was conferred not merely in the interests of the wife but also of the public, and that the wife could not by her covenant preclude herself from invoking or the court from exercising that jurisdiction. Lord Hailsham, L.C., said (3): "The parties cannot validly make "an agreement either (1.) not to invoke the jurisdiction of the "court, or (2.) to control the powers of the court when its "jurisdiction is invoked".

Mr. Fairweather for the wife conceded that unless *Hyman* v. *Hyman* (4) can be distinguished, as he says it can, then the promise by the wife contained in cl. 10 of the deed would, in part at any rate, be void and unenforceable. It is this promise which is described in the recitals as the consideration for the husband's bond to pay these annuities. If the wife's promise in cl. 10 is merely a nullity, the defence must fail, for the husband's promise is under seal and requires no consideration to support it. *Gaisberg* v. *Storr* (5), upon which the husband relies, does not therefore really help him. But although no consideration is necessary, if the bond in fact provides for a consideration and that consideration consists of a promise to do an act which is illegal or contrary to public policy, the bond is void and cannot be enforced. The distinction has been clearly settled in deeds which provide for payments in consideration of past cohabitation on the one hand and future cohabitation on the other, such as in *Fisher* v. *Bridges* (6).

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(2) [1929] A. C. 601.

(3) Ibid. 608.

(4) [1929] A. C. 601.

I have first, therefore, to determine whether an agreement not to invoke the jurisdiction of the court is something which the law condemns as illegal or contrary to public policy. It is not in terms so stated to be in *Hyman* v. *Hyman* (7), but in my judgment it clearly is; *Czarnikow* v. *Roth, Schmidt & Co.* (8) is sufficient authority for that. There is, of course, nothing as immoral about such an agreement as there is about a promise to cohabit outside marriage; but if the promise is contrary to public policy, the degree of moral obliquity is irrelevant. A covenant in restraint of trade would perhaps be a closer analogy.

It is well settled that if part only of the consideration for a promise is contrary to public policy, that promise cannot be enforced. Having regard to the terms of the recital, this deed cannot be construed so as to make the wife's promise in cl. 10 other than a part of the consideration for the husband's promise to pay the annuities; Mr. Fairweather has not contended otherwise, and he has not suggested that if any part of the wife's promise is bad, it can be severed leaving the rest of the deed good. I mention this so as to make it clear that the decision which I am about to give turns upon the particular provisions of this deed which is apparently based on the precedent set out in Key and Elphinstone's Precedents in Conveyancing (14th ed.), vol. 2, p. 541. In *Hyman* v. *Hyman* (9), for example, it may well be that the objectionable cl. 3 in the deed would have been severable from the husband's promise; this may explain, if any

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(5) [1950] 1 K. B. 107.
(6) (1854) 3 E. & B. 642, 650.
(7) [1929] A. C. 601.
(8) [1922] 2 K. B. 478.
(9) [1929] A. C. 601.

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explanation be needed other than the fact that the point was not under consideration, why some of their Lordships, particularly Lord Atkin, referred (10) to the husband's promise in that case as being still alive.

The propositions which I have so far enunciated have not been seriously disputed, if they were disputed at all, by Mr. Fairweather. His contention is that cl. 10 upon its proper construction contains no promise of the sort that was condemned in *Hyman* v. *Hyman* (11). Two such promises are relied on by the defendant, the first being the promise by the wife not to invoke the jurisdiction of the court with regard to her own maintenance; and the second being her promise not to procure, suggest, assist or encourage on behalf of either of her children any proceedings in respect of maintenance for them, but to accept the provision made for the younger son in full satisfaction of his rights.

As to the first promise, Mr. Fairweather's argument is this. At the time of the deed there was pending a petition for maintenance. There was nothing objectionable in compromising that petition and in the wife's agreeing that she would consent to its being dismissed having regard to the provision made for her in the deed. Once she had consented to its dismissal, she deprived herself of the right to make any further application for maintenance under s. 190 and the court of jurisdiction to grant it. Accordingly, the promise to refrain from future proceedings, in so far as it affects the wife herself, is otiose, and ought to be disregarded; no such proceedings could in any event have been taken, and the true effect of the clause is merely to compromise pending proceedings.

In support of this argument, I was referred to *Mann* v. *Mann* (12) and *Mills* v. *Mills* (13). Mr. Brodrick, for the husband, argued that the wife was not precluded from applying to the court under s. 190, relying on *Fisher* v. *Fisher* (14). He argued, also, that even in relation to the pending petition, the promise not to proceed further with it and to consent to its being dismissed, was an attempt to control the jurisdiction of the court and thus bad.

I shall not decide the case on this point, and shall not, therefore, express any views on matters which are unnecessary to my decision, and which are more happily elucidated in the Divorce Division. I think that Mr. Fairweather clearly fails on the other point. It is, as I have said, sufficient that any part of the promise contained in clause 10 should be contrary to public policy. Section 193 of the Act of 1925 clearly provides that the court may at any time make for the maintenance of the child such provision as it thinks just; and it is not, therefore, contended that a dismissal of a petition with regard to that can deprive the court of jurisdiction.

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(10) [1929] A. C. 601, 626.

(11) [1929] A. C. 601.

(12) [1936] W. N. 92.

(13) [1940] P. 124.

(14) [1942] P. 101.

Mr. Fairweather's argument on this point is that it is not contrary to public policy for the wife to promise not to apply for such maintenance, and that *Hyman* v. *Hyman* (15) is not in point. He contends that that decision must be restricted to its own facts and treated as relating only to a promise made during the coverture by a wife in relation to her own maintenance. I cannot, particularly with the guidance I receive from the judgments of Willmer, J., in *Ross* v. *Ross* (16) and Asquith, L.J., in *Combe* v. *Combe* (17), give this decision such a restricted meaning. It decides that although the wife is the primary beneficiary under s. 190, she cannot oust the jurisdiction which it gives to the court since it is in the public interest that former wives be adequately provided for. If this be the public interest in the case of the wife, it must be so also, and indeed a fortiori in the case of the children under s. 193. It is conceded that the wife who has the custody of the children is the person to whom maintenance awarded under s. 193 is payable: see *Yates* v. *Starkey*, *per* Hodson, L.J. (18).

It appears to me, therefore, to be plainly contrary to public policy for a wife, who has the custody of a child, and who is therefore the natural person to take such action as may be necessary to see that the child is adequately provided for, to promise that she will not procure, suggest, assist or encourage the taking of any proceedings on behalf of her child under s. 193 or otherwise for maintenance. It is her duty to determine, if circumstances should change, whether the amount agreed between the parties is adequate or not; and if it is not, to apply to the court for the necessary provision. She cannot rid herself of that duty nor deprive herself of that power nor promise not to invoke the jurisdiction of the court with regard to it. It is true that *Hyman* v. *Hyman* (19) is not directly applicable. But if I had to consider the matter afresh and without the light that *Hyman* v. *Hyman* (19) throws on the topic, I should still conclude that a

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(15) [1929] A. C. 601.
(16) [1950] P. 160, 165.
(17) Ante, 215.
(18) [1951] W. N. 177.
(19) [1929] A. C. 601.

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Devlin, J.

promise by a wife, particularly when made as part of a bargain under which she may herself derive benefits, never to re-open the matter of the maintenance of a child whose custody she has, is contrary to public policy. In my judgment the husband's covenant sued on in this case is unenforceable, and the claim must be dismissed.

I am not indifferent to the consideration that if all that Mr. Fairweather has argued is correct, the wife may have finally deprived herself of her rights to statutory maintenance in exchange for a deed that was never effective. I trust that as a matter of law this is not so. But it is not a consideration that I could allow to affect my mind on the issue which I have had to determine.

Judgment for the defendant.

Solicitors: *John B. de Fonblanque; Walter, Burgis & Co.*

C. A.

1951
June 12.

Somervell, Denning and Hodson, L.JJ.

BRIDGMONT *v.* ASSOCIATED NEWSPAPERS LD. AND OTHERS.

[1951 B. 69.]

Defamation—Libel—Slander—Damages for both causes of action claimed in one statement of claim—Damages—Admissibility of evidence as to defendants' intention—Order for separate trials of libel and slander—Severance not justified—R. S. C. Ord. 18, *rr.* 1, 8, 9.

The plaintiff in his statement of claim claimed damages for libel in respect of an article published in the Daily Mail, and also damages for slanders which he alleged had been uttered by two reporters on the staff of the newspaper (one of whom was admitted to be the writer of the article) and which indicated that the plaintiff was one of the persons referred to in the article. The defendants applied under Ord. 18, rr. 1, 8 and 9 of the Rules of the Supreme Court for a severance of the causes of action for slander from the cause of action for libel. The master refused to make the order, but on appeal Slade, J., ordered "that the causes of action for "slander be tried separately from and immediately after the cause "of action in libel and that the plaintiff have leave to deliver two "new statements of claim". On appeal:—

Held, that the evidence as to the slanders, as identifying the plaintiff with one of the persons referred to in the article, was relevant to and admissible in the libel action, at least on the question of damages; and that there was nothing in the circumstances which would justify a severance of the causes of action.

Pearson v. *Lemaitre* (1843) 5 M. & Gr. 700 applied.

APPEAL from Slade, J.

On November 14, 1950, the Daily Mail published an article in respect of which the plaintiff, Bridgmont, brought an action for libel. The article contained the following passage: "The first summons in connexion with the B.B.C. bribery "allegations was served yesterday on Mr. Roy Speer, 38, a "senior producer. I understand that three more summonses are "due to be issued. One of these affects a television producer; "another concerns one of the most famous sound-variety pro-"ducers now working for the B.B.C.". The article was admittedly written by the second defendant, one Stubbs Walker, a reporter in the employ of the first defendants, Associated Newspapers Ld.

The plaintiff also complained of slanders alleged to have been uttered in the presence of other persons by the defendant Walker and by the defendant Cecil Wilson, another journalist, said to be employed by the Daily Mail, and which, it was alleged, asserted that the plaintiff was one of the persons referred to in the article.

The plaintiff by his pleadings claimed in the one action damages for both libel and slander. The slanders were alleged to have been uttered by Walker and Wilson in the course of their employment, so that the first defendants were said to be liable for both libel and slander.

On May 11, 1951, Slade, J., on the application of the defendants, made an order under Ord. 18, rr. 1, 8 and 9, of the Rules of the Supreme Court (1), "that the causes of action for slander

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(1) R. S. C., Ord. 18, r. 1: "Sub-"ject to the following rules of this "order, the plaintiff may unite in the "same action several causes of action; "but if it appear to the court or a "judge that any such causes of action "cannot be conveniently tried or dis-"posed of together, the court or judge "may order separate trials of any such "causes of action be had, or may "make such other order as may be "necessary or expedient for the "separate disposal thereof".

Rule 8: "Any defendant alleging "that the plaintiff has united in the "same action several causes of action "which cannot be conveniently dis-"posed of together, may at any time "apply to the court or a judge for an "order confining the action to such of "the causes of action as may be con-"veniently disposed of together".

Rule 9: "If, on the hearing of such "application as in the last preceding "rule mentioned, it shall appear to "the court or judge that the causes "of action are such as cannot be con-"veniently disposed of together, the "court or judge may order any of such "causes of action to be excluded, and "consequential amendments to be "made, and may make such order as "to costs as may be just".

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"be tried separately from and immediately after the cause of "action for libel", and that the plaintiff should have leave to deliver two new statements of claim, pleading the causes of action for libel and slander respectively. He took the view that what was alleged to have been said in the slander, though it was denied, was not only wholly irrelevant to any issue which would arise on the libel, but would be embarrassing for the jury to have it in their minds when deciding the libel action.

The plaintiff appealed.

Scott Cairns, K.C., and *Dennis Lloyd* for the plaintiff.
H. P. J. Milmo for Associated Newspapers Ld. and Walker.
John Thompson for Wilson.

The arguments of counsel sufficiently appear from the judgments.

Somervell, L.J. The judge, in giving the plaintiff leave to appeal, stated that, although he had exercised his discretion in arriving at the conclusion expressed in his order, he regarded the issue as a matter of some importance, upon which no authority had been cited, apart from the wording of Ord. 18, rr. 1, 8 and 9, and possibly involving a question of principle. It would, of course, very often be a matter of discretion, with which the Court of Appeal would not interfere unless it were satisfied that the judge had gone wrong in principle. But it is a somewhat unprecedented form of order, and the judge himself felt that a question of principle was involved.

I can say what is necessary to decide this appeal quite shortly, but I want, if I can, to avoid saying anything to prejudge issues which would be the proper matter of argument at the trial. I must say a little about the general nature of the statement of claim. The two paragraphs which are relevant to the libel are these: "'The first summons in connexion with the B.B.C. "'bribery allegations was served yesterday on Mr. Roy Speer, "'38, a senior producer. I understand that three more summonses are due to be issued. One of these affects a television "'producer; another concerns one of the most famous sound-variety producers now working for the B.B.C.'". Then there is added in brackets, "meaning the plaintiff".

This is one of those familiar cases where certain general words are used and, speaking quite generally, the plaintiff takes upon himself the burden of establishing that the words would be read by the public, or by a particular section of the public, as referring to him. There were three defendants: Associated Newspapers Limited, Walker and Wilson. Walker was admittedly a reporter employed by the Daily Mail and admittedly the writer of the article. The first alleged slander is that "the defendant "Walker, in the course of his employment by the defendant "company, falsely and maliciously spoke and published of the "plaintiff . . . the words following or words to the like effect: "'It's you' (meaning the plaintiff) 'we want to see'; 'Have "'you got anything to say about the news this morning?'; "'We're not really talking about Roy Speer. Didn't you see "'the announcement in the "Mail" that another radio pro- "'ducer' (meaning the plaintiff) 'and a television producer were "'also to be issued with summonses?'; 'Well, you' (meaning "the plaintiff) 'are the person referred to'". Then there is a reference to another name which I need not mention. The judge took the view that what is alleged to have been said in that slander, though it is denied, was wholly irrelevant to any issue which would arise on the libel, and that it would be embarrassing for the jury to have it in their minds; although no doubt the judge had in mind the fact, with which he is undoubtedly very familiar, that cases do not infrequently arise in criminal and civil law where the jury have to be directed, in arriving at certain conclusions, to disregard certain of the evidence which they have heard.

Mr. Scott Cairns, for the plaintiff, advanced two propositions and, broadly speaking, Mr. Milmo agreed that if either of them were established the appeal must succeed. The first proposition was that the judge was wrong in law in holding that the principal facts, as they would emerge in relation to the first and third slanders, were irrelevant to the issue on the libel. To express it in another way. Counsel submitted that if the plaintiff had not added these claims in slander he would be entitled to prove the facts on which they are based as relevant to the issue of libel. That was his main point and he put it under two heads. He submitted that the judge was wrong in holding that the statement by the writer that he intended the plaintiff was irrelevant on the issue whether the words in the libel were spoken of and concerning the plaintiff. He admitted, I think, that the plaintiff would first have to establish, by evidence, that the words as read by the public, or a sufficient section of the public, were to be taken as decisive. I do not want to express any concluded view on that point because it is not in my view necessary for the decision of this appeal; and, if it arises, it is a matter which will be open for argument before the judge who tries the case.

The second head of Mr. Scott Cairns' argument was that the judge was wrong in coming to the conclusion that the evidence was irrelevant and inadmissible on the question of damages. The judge said this: " Some argument was put forward upon the " basis that it would be proper to introduce the matters com- " plained of in the slander in any event, irrespective of whether " the causes of action for slander were left in the libel action or " not, and it was suggested that that was a proper ground, " indeed, for increasing the damages. I agree that in so far as " the publication of other libels or slanders is evidence of malice, " malice is always a ground for aggravating the damages, but it " would be quite wrong in this case to allow the damages for the " alleged libel to be increased upon the basis that three slanders " had been published, whilst there was an action proceeding for " damages in respect of the very publication of those three " slanders, because to do that would be to allow damages to be " recovered twice over for the same alleged wrong. Secondly, I " emphasize that there is no defence raised on the part of any of " these defendants in this action which of itself involves proof of " an issue of malice, and therefore the only possible relevance of " malice in this action could be for the purpose of aggravating " the damages, not for destroying any defence such as privilege " or fair comment ".

We were referred to some authorities, including *Spiers and Pond Ld.* v. *John Bull Ld.* (2). The plaintiffs were owners and managers of hotels and the defendants were proprietors of the newspaper John Bull, in which the alleged libel occurred. The alleged libel referred to certain incidents and went on: " there are " certainly no good or sufficient reasons why the Masonic craft " should not protect themselves against being placed in a false " position by the employment of Germhun (sic) waiters and " managers in hotels where they hold their lodge meetings and " other 'functions' ". Earlier in the libel it had said: " Though " there may be good and sufficient official reasons for suppressing " the name of the hotel—which we know ". The original interrogatory drafted, which was held to be too wide, was in these words: " Do not the words complained of in para. 3 of the statement of " claim or some and which of them refer to the plaintiffs?". The interrogatory allowed was: " Is not the name of the hotel there

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(2) (1916) 114 L. T. 641.

"referred to, and which you say you know, the Holborn Viaduct "Hotel?". That was allowed, judgments being delivered by Swinfen Eady, Pickford and Bankes, L.JJ. Though Swinfen Eady, L.J., may have put it more widely, Bankes, L.J., said (3): "I think the interrogatory as originally drawn is undoubtedly too "wide. A party cannot in general interrogate his opponent as "to the meaning of words used by the latter. Such an interrogatory"—and I think the Lord Justice there clearly means "such an interrogatory as we are proposing to allow"—"is, "however, admissible on the question of damages".

Mr. Scott Cairns also relied on the old case of *Pearson* v. *Lemaitre* (4). The rule there laid down, as stated in Gatley on Libel and Slander (3rd ed.), p. 626, is this: "Either party may, "with a view to the damages, give evidence to prove or disprove "the existence of a malicious motive in the mind of the publisher "of defamatory matter; but that if the evidence given for that "purpose establishes another cause of action the jury should be "cautioned against giving any damages in respect of it. And if "such evidence is offered for the purpose of obtaining damages "for such subsequent injury it will be properly rejected. . . . "Upon principle, we think that the spirit and intention of the "party publishing a libel are fit to be considered by a jury, in "estimating the injury done to the plaintiff; and that evidence "tending to prove it cannot be excluded simply because it may "disclose another and different cause of action".

Mr. Milmo did not dispute that in certain circumstances a defendant, in reduction of damages, is entitled to give evidence as to his intention—evidence, as it were, of a kind contrary to that which the plaintiff seeks to bring forward in this action. He based his submission on the fact that on the pleadings as they are—though of course under the judge's order there are going to be new pleadings—he could not give a notice mitigating, and he did not intend to do so. He submitted that, that being so, the plaintiff ought not to be allowed to lead evidence with regard to damages of the kind indicated. I cannot think that that is right; I cannot think that the defendant, by not mitigating, can affect the right of the plaintiff, if he has such a right, to lead evidence relevant to damages which might lead to their increase.

With that authority and that principle in mind, I will turn back to the passage in Slade, J.'s judgment. In the words I have read I think he based his conclusion that evidence of this kind could not be allowed in this case, and on these pleadings, on the fact that there were these separate counts of slander. I do not think that that is right. I think that the passage above giving the principle laid down in *Pearson* v. *Lemaitre* (5) points to a different conclusion. You do not exclude the evidence, as it seems to me; but the fact that that evidence has been called may have its repercussion in certain cases, possibly in all cases, on the damages claimed and granted, as here, in respect of the claims for slander. But I think injustice might be done if the mere fact that a slander action had been added were held to preclude the calling of evidence of this kind which would otherwise be material. The plaintiff may, and I think in this case does, primarily want to succeed on his libel action, and he ought to be able to call all relevant evidence with regard to that. I agree with the judge that there is no issue of malice in the ordinary sense on these pleadings; but that is not necessary, on the authorities, in order to make this kind of evidence relevant to damages. That being so, as I have said, Mr. Milmo admitted that the appeal should succeed.

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(3) 114 L. T. 643.

(4) (1843) 5 M. & Gr. 700.

I should perhaps refer to the point which Mr. Scott Cairns also made, that the judge's order would cause considerable delay and result in a considerable increase of costs. Having come to the conclusion I have stated in regard to the relevance of this evidence in respect of damages, I can see no circumstances which would justify a severance as provided for by the judge, and I would allow the appeal and restore the order made by the master.

DENNING, L.J. I agree. If it is admissible for a defendant in a libel action to give evidence that he did not intend to refer to the plaintiff, then it must also be admissible for a plaintiff to give evidence that the defendant did in fact intend to refer to him. Such evidence is clearly admissible on damages. It is also clearly admissible on liability where fair comment or privilege is pleaded. I say nothing as to whether it would be admissible on liability where the only issue was whether the words were published of and concerning the plaintiff. It may be so, but for present purposes it is sufficient to say that in nearly every libel action there is the additional issue of damages. The evidence is admissible on that issue in any event. That means that in this case, if the libel action were tried separately, evidence of the alleged slanders could be given in that action. The better course, therefore, is to let the whole matter, both the alleged libels and the alleged slanders, be tried in one action. I agree that the appeal should be allowed.

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(5) 5 M. & Gr. 700.

HODSON, L.J. I agree. Since we are differing from the judge, who has exercised his discretion, I think it right to add a few words of my own. The plaintiff puts the case in two ways: he says, taking his second submission first, that, even if the evidence in relation to the slanders is inadmissible in relation to the libel, yet there ought not to be a severance. If he succeeded in that contention, I for my part should have been unwilling to reverse the judge in the exercise of his discretion.

But he has also argued that the evidence relating to the slanders is admissible in relation to the libel. That comes under two heads. First, he says that the evidence of the slander is admissible in order to prove subjective intention. For my part, although, as my Lord has pointed out, it is not necessary to give a ruling upon this subject, I do not dissent from the opinion of the judge that what is wholly immaterial is what was the objective intention of the person who published the words or caused them to be published, that is to say, on the question of liability. Under the second head, namely, damages, again I do not dissent from the way in which the judge put the matter in so far as he deals with it on general principles. My Lord has already read the passage in which the judge concluded by saying: "I agree "that in so far as the publication of other libels or slanders is "evidence of malice, malice is always a ground for aggravating "the damages". So far so good. But after that the judge said that in his opinion "it would be quite wrong in this case to allow "the damages for the alleged libel to be increased upon the basis "that three slanders had been published whilst there was an "action proceeding for damages in respect of the very publication "of those three slanders, because to do that would be to allow "damages to be recovered twice over for the same alleged "wrong". With all respect to him, I think that in making this exception the judge is going against the statement of the law as given by Tindal, C.J., in *Pearson* v. *Lemaitre* (6). I need not re-read the passage: it seems to me to contemplate exactly that state of affairs. For these reasons, as well as those which have

(6) 5 M. & Gr. 700.

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been given by my Lords, I agree that the appeal should be allowed and the order of the master restored.

Appeal allowed.

Solicitors: *Rubinstein, Nash & Co.; Lewis & Lewis and Gisborne & Co.; Blount, Petre & Co.*

A. W. G.

1951
May 24, 25, 28.

Hilbery, J.

GROVE *v.* EASTERN GAS BOARD.

[*Affirmed.* [1952] 1 K.B. 77

[1949 G. 2908.]

Gas—Trespass—Householder with prepayment gas meter—Inability of gas officials to obtain entry for collection and inspection—Forced entry—Whether within statutory powers—Gas Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 67), *Sched. III, para.* 34.

The defendant board supplied gas to the plaintiff by means of a prepayment coin-box and meter installed in the plaintiff's house. Gas collectors having made repeated calls at the plaintiff's house without being able to obtain admission, an inspector of the board, holding a duly authenticated document showing his authority to enter, broke into the house, inspected the meters and fittings, and emptied the coin-box. While he was doing so he showed his document of authority to a neighbour of the plaintiff. The plaintiff brought this action for damages for unlawful entry. The board admitted the entry, but claimed that it was made under their powers derived from the Gas Act, 1948.

Held, that the gas legislation in force before the passing of the Gas Act, 1948, clearly authorized what would otherwise be an unlawful entry; that the intention in the Act was to give area gas boards the powers which had been possessed by their predecessors; that the wording of para. 34 of Sched. III, particularly when read in the context of paras. 35 and 36, did not give the new boards a substantially different or restricted power of entry, but required the entry to be made at a reasonable time and the document of authority to be produced if anyone reasonably requested it; and that the entry in question was accordingly lawful.

Action tried by Hilbery, J., with a jury.

For several years before 1949 the house of the plaintiff, Charles André Grove, was supplied with gas for domestic purposes by the

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[Reported by Miss J. F. Lamb, Barrister-at-Law.]

Tottenham and District Gas Company. The gas was supplied on the coin rental system whereby it was paid for in advance by means of a coin-box and meter, the property of the company, installed in the house. Until the necessary coins to pay for a certain quantity of gas were put into the coin-box no gas was supplied. From time to time, as a matter of routine, the company's collectors called, collected the money in the coin-box and left a receipt, read the meter, and inspected the fittings.

On the coming into force of the Gas Act, 1948, on May 1, 1949, all the property, rights, liabilities and obligations of the company vested in the defendants, the Eastern Gas Board, who thus became the owners of the meter, coin-box, gas pipes and other gas equipment and fittings in the plaintiff's house. The board adopted the same system of routine calls by collectors to empty the coin-box and inspect the fittings as had been employed by the company. The board twice sent to the plaintiff printed forms of contract containing the terms and conditions on which they were willing to continue the supply of gas, but the plaintiff ignored the forms and continued to use the gas.

On April 29, May 3 and June 13, 1949, collectors called at the plaintiff's house but obtained no answer to their knocking. A special collector called on June 15 and another special collector on June 27, July 12 and July 26, and on each occasion no one answered the door, although on the latter date the special collector reported that he had heard someone moving about inside the house. On the last three occasions the special collector left at the house a printed pre-paid post card with spaces in which the householder could fill in the date and time when it would be convenient for a collector to call. None of these cards was returned to the board.

On August 3 an inspector of the board, holding and having with him a duly authenticated document showing his authority, and accompanied by a skilled carpenter, was sent by the board with orders to enter the house, if necessary by force, and to examine and read the meter, collect the coins in the coin-box, and to make the routine inspection of the inlet and outlet junctions. There being no response to knocking on the door, the carpenter carefully removed a complete pane of glass from beside the front door, the only entrance to the house, put his hand inside and opened the door. The inspector thereupon entered, examined and read the meter, collected the coins that were in the box, examined the inlet and outlet junctions and left the premises. The carpenter then replaced the pane of glass securely and properly, fixing it in with putty in the same way that it had previously been fixed, and the front door was properly closed.

During the course of these proceedings a neighbour of the plaintiff spoke to the two men, and the inspector produced to her his document of authorization.

The plaintiff brought this action for damages against the board alleging that on August 3, 1949, their servants or agents had wrongfully broken into his house by removing a front window. The board admitted the entry but denied that it was wrongful, contending that it was made under their powers derived from para. 34, Sch. III, to the Gas Act, 1948 (1), by an officer holding a duly authenticated document, and that the pane of glass was duly replaced.

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(1) Gas Act, 1948, Sch. III, para. 34: " (1.) Any officer authorized " by an Area Board may at all reasonable times on the production of some " duly authenticated document showing his authority, enter any premises " in which there is a service pipe connected with the gas mains of the " Board, in order to inspect the meters, " fittings and works for the supply of " gas, or for the purpose of ascertaining the quantity of gas consumed or " supplied, except in a case where the " occupier of the premises has applied " in writing to the Board for the disconnexion of the service pipe from " the mains and the Board have failed " to disconnect it within a reasonable " time ".

Para. 35: " (1.) Where—(*a*) A " person occupying premises supplied " with gas by an Area Board ceases to " require such a supply; or (*b*) A " person entering into the occupation " of any premises previously supplied " with gas by an Area Board does not " take a supply of gas from the Board " or hire such of the pipes, meters, " fittings or apparatus on the premises " as belong to the Board; or (*c*) An " Area Board are authorized to cut off " the supply of gas from any premises, " it shall be lawful for an officer authorized by the Board after twenty-four " hours' notice to the occupier under " the hand of an officer so authorized, " or if the premises are unoccupied to " the owner or lessee of the premises, " to enter the premises at all reasonable times for the purpose of " removing and to remove any pipes, " meters, fittings or apparatus, through " which the supply was given to the " first-mentioned premises.

" (2.) The notice required to be " given by the last preceding subparagraph may, in the case of " unoccupied premises, the owner or " lessee of which is unknown to the " Area Board and cannot be ascertained after diligent inquiry, be " given by affixing it upon a conspicuous part of the premises not " less than forty-eight hours before the " premises are entered.

" (3.) Where an Area Board have " reasonable cause to suspect that gas " is escaping in any premises it shall " be lawful for an officer authorized " by the Board to enter the premises " for the purpose of inspecting the gas " fittings and preventing the escape " and to inspect such fittings and carry " out any work necessary to prevent " such escape ".

Para. 36: " Where, in pursuance of " any powers conferred by this " schedule, entry is made on any " premises by an officer of an Area " Board, the officer shall ensure that " the premises are not left less secure " by reason of the entry, and the " Board shall make good or pay compensation for any damage caused by " the officer in entering the premises, " in carrying out any inspection or " work therein or in making the " premises secure ".

By way of counterclaim the board alleged that it was a term of the contract under which the plaintiff received gas that their officers should have free access at all reasonable times to clear the coin-box of his meter, and they claimed damages in that in breach of that term the plaintiff failed from March 3 to August 3, 1949, to give that access, as a result of which much public time was wasted and the board suffered loss and expense.

Before hearing argument on the question of the board's liability in law Hilbery, J., asked the jury to assess the damages provisionally on the assumption that the entry into the plaintiff's house was unlawful and a trespass, and on that basis the jury assessed the damages at 150*l*.

Gerald Gardiner, K.C., and *Bernard Lewis* for the defendant board. It has been conceded that in paras. 35 and 36 of Sch. III the context required the word " enter " to be read as including forcible entry. The argument advanced for the plaintiff appears to be that the requirement in para. 34 of Sch. III about production of a duly authenticated document must mean that, before entry into premises, there must be production of the document to someone, and that if there be no one on the premises there can be no production of the document and therefore no entry. The reply to that argument is that the introduction, in para. 34, of the words relating to production of the document could not have been intended to effect a change in the meaning of the word " enter " so that it has a different meaning in para. 34 from that which it bears in paras. 35 and 36.

If the interposition of the requirement about production of the authenticated document had that effect, the result would be to oblige gas boards all over the country to go on supplying gas to people who prevented them from recovering their money. They would be unable to sue the occupier because he would have paid them by placing money in the meter.

The words " on the production of an authenticated document " imply merely a duty on the official to have the document with him and available for production to anyone appearing to whom he should produce it. In any event, in the present case, there had been a production of the document by the board's officer to the plaintiff's neighbour.

Melford Stevenson, K.C., and *L. Pearl* for the plaintiff. The word " production " in para. 34 does not mean merely having the document available in a waistcoat pocket. Production means what it says, and actual production is a condition precedent to the exercise of the power conferred by para. 34.

[HILBERY, J. Production to whom?]

It might be production to anyone, but primarily to the occupant of the house. Para. 34 should be considered in relation to para. 37, which refers to the case where a gas officer is obstructed. A reasonable explanation of the introduction into the Act of 1948 of the words relating to the production of the document is that persons were found to be obtaining entry into houses by falsely representing themselves to be gas or other officials. But an official having the document could then produce it to an occupant and tell him that if he refused the official entry he would be committing a criminal offence. Effect must be given to the word "production" as meaning production to the person primarily interested to see that no unauthorized person entered the premises.

Moreover, the word "entry" in para. 34 means peaceable entry, notwithstanding that in paras. 35 and 36 it includes forcible entry.

Cur. adv. vult.

May 28. HILBERY, J., reading his judgment, stated the facts substantially as above set out, and continued:—The plaintiff's claim is for damages at large for trespass. His allegation is that the entry, thus forcibly effected, was illegal. The defendant board answer that the entry was legally made by statutory authority under para. 34 of Sch. III to the Gas Act, 1948. Counsel for the plaintiff has argued that, having regard to its whole context, that paragraph gives no right to the board to make a forcible entry, or that if it does, then only on production of the duly authenticated document to someone, primarily the occupier of the premises.

The Third Schedule to the Act of 1948, as stated in s. 56, contains the code of provisions relating to gas supply. [His Lordship read para. 34 and continued:] The first question to be decided is whether as a matter of construction this paragraph, having regard to its terms, authorizes a forcible entry. That before the Act of 1948 gas undertakings had always had statutory authority to enter premises to which they supplied gas is clear; nor do I think that it can reasonably be doubted that such an authority to enter was previously given by Parliament, contemplating that the power might be used for making a forcible entry and intending to authorize such an entry, which would otherwise have been unlawful.

The original Gas Clauses Act, 1871, by s. 21, provided as follows: " Any officer appointed by the undertakers may at all " reasonable times enter any building or land lighted with gas " supplied by the undertakers, in order to inspect the meters, " fittings, and works for the supply of gas, and for the purpose " of ascertaining the quantity of gas consumed or supplied; and " if any person hinder such officer as aforesaid from entering and " making such inspection as aforesaid at any reasonable time, he " shall for every such offence forfeit to the undertakers a sum not " exceeding five pounds ".

The Gas Undertakings Act of 1934 re-enacted that section with certain minor alterations; thus s. 21, sub-s. 1, of the Act of 1934 reads as follows: " The powers of entry and inspection " conferred on officers appointed by undertakers by s. 21 of the " Gasworks Clauses Act, 1871, as applied to any undertakers by " any enactment, shall include power to enter, at all reasonable " times, any premises in which there is a service pipe connected " with the gas mains of the undertakers, in order to inspect the " meters, fittings and works for the supply of gas, except in a " case where the occupier of the premises has applied in writing " to the undertakers for the disconnexion of the service pipe from " the mains and the undertakers have failed to disconnect it " within a reasonable time ".

By s. 21, sub-s. 3, of the Act of 1934: " The notice required " to be given by s. 22 of the Gasworks Clauses Act, 1871, as " applied to any undertakers by any enactment, before entering " any unoccupied premises under that section may, in a case " where the owner of the premises is unknown to the undertakers " and cannot be ascertained after diligent inquiry, be given by " affixing it upon a conspicuous part of the premises not less than " forty-eight hours before the premises are entered . . .".

Section 22 of the Act of 1871 is in these terms: " In all " cases in which a consumer of gas supplied by the undertakers " ceases to require a supply of such gas, and in all cases in which " the undertakers are authorized to take away and cut off the " supply of gas from any premises, it shall be lawful for the " undertakers, their agents or workmen, after twenty-four hours' " notice in writing, under the hand of the secretary or other " properly authorized officer of the undertakers, to the occupier, " or if unoccupied, then to the owner or lessee, or to the agent " of the owner or lessee, of any premises in which any pipes, "meters, fittings, or apparatus belonging to the undertakers are "laid or fixed, and through or in which the supply of gas is from "any such cause discontinued, to enter such premises between "the hours of 9 in the morning and 4 in the evening, for the "purpose of removing and to remove such pipes, meters, fittings, "or apparatus, repairing all damage caused by such entry or "removal".

Section 21, sub-s. 3, of the Gas Undertakings Act, 1934, contains a provision which indicates clearly that the power given to enter by s. 21, sub-s. 3, was intended to authorize what would otherwise be an unlawful entry. Thus the proviso to s. 21, sub-s. 3, reads as follows: "Provided that, where an entry is "made on premises which could not lawfully have been made "but for the provisions of this sub-section, the premises shall be "left no less secure than they were immediately before they were "entered". That proviso by implication accepts, as falling under the power to enter, a type of entry which, but for the power to enter would be unlawful, i.e., would be a trespass by breaking and entering, and a special duty is therefore laid on the undertaker to make good the damage done in so using that power.

If para. 34 of Sch. III to the Act of 1948 is intended to give the same power to the new gas board which is being set up by the Act as the earlier gas undertakers had been given, then the paragraph should be construed so as to give that same power. The argument of counsel for the plaintiff is that in terms it does not give the same powers, but gives only a limited power of entry; a power of entry subject to the condition that it can only be made on production by the person entering of some duly authenticated document showing his authority, and that this can only be done if there is a person to whom such a document can be shown, and that the person to whom it is thus to be shown must be intended to be the occupier of the premises.

As I have pointed out, in my view the gas undertakers, whose undertakings were vested under the Act of 1948 in one or other of the gas boards constituted by that Act, had a statutory right to enter by force in order to inspect the meters, fittings and works for the supply of gas or for the purpose of ascertaining the quantity of gas consumed or supplied. That, broadly speaking, the intention of the legislature in enacting the Act of 1948 was to give to the newly constituted boards all the rights of the gas undertakings which were being taken over and vested in the newly created boards is plain from the terms of s. 17, sub-s. 1, which enacted as follows: "Subject to the provisions of this

"Part of this Act, all property, rights, liabilities and obligations "which, immediately before such date as may be appointed by "order of the Minister (in this Act referred to as 'the vesting "'date'), were property, rights, liabilities and obligations of an "undertaker to whom this Part of this Act applies, shall on the "vesting date vest by virtue of this Act and without further "assurance in such area board as may be determined by order of "the Minister . . .".

Starting from that basis, it would seem right to say that unless the statute of 1948, by the language employed in para. 34 of Sch. III, has expressly taken away that wide power of entry which was one of the rights of the former gas undertakers, and has substituted for it a different and much restricted power, one would expect the new boards to have the same rights as the undertakers had previously exercised and which, be it observed, would never have been granted them unless owing to the very nature of their undertakings, it had been considered necessary that they should have them.

Does, then, the language of para. 34 oblige one to conclude that it is intended to deprive the new gas boards of what had hitherto been regarded as a necessary power to give them instead only a restricted power of entry, one which would only be exercisable when the occupier had the duly authenticated document of authority produced to him? I think not. The paragraph must be read in its context with paras. 35 and 36, and in its place in the whole Act. The side-note to para. 34 is: "Entry for purposes of inspection". The side-note to para. 35 is: "Entry "for purposes of removing pipes, etc., on discontinuance of "supply". The last paragraph prescribes the preliminaries necessary to an entry by the board for any of the purposes particularized in that paragraph. It reads as follows. [His Lordship read para. 35 and continued:] Para. 36 expressly places a duty upon the area board to make good any damage caused by their officer in entering in pursuance of "any" powers conferred by the schedule, and to leave the premises not less secure by reason of the entry. That paragraph does not, as is done in the Act of 1934, expressly refer to an entry which, if it were not effected under powers given by the Act of 1948, would have been unlawful, but it clearly contemplates forcible entry, for it requires the board to make good damage done by its officer in entering. If a forcible entry under para. 35, effected when the premises were unoccupied, were the only case where a forcible entry doing damage was required to be made good, one would have expected para. 36 in terms to have limited the liability to make good to an entry under para. 35; but it does not. The words used in para. 36 are: " Where, in pursuance of any powers " conferred by this schedule, entry is made on any premises by " an officer of an area board ". It appears to me that that must be intended to include an entry under para. 34. If so, an entry under para. 34 is contemplated as one which may necessitate damage being done to the premises. If an entry under para. 34 were, as the plaintiff contends, confined to the case where the authenticated document giving the officer authority to enter has been produced to the occupier, it is hardly conceivable that damage would in such circumstances be done to force an entry. The occupier, who would then be refusing admission to the board's authorized officer, would be a person committing the offence against para. 37 of the schedule of obstructing an officer of the board exercising powers given by the schedule, and would be liable on summary conviction to a fine not exceeding 5*l*. The remedy of the board in such circumstances would be by way of proceedings under para. 37.

What para. 34 requires in my view is that the entry for the purposes mentioned in that paragraph must be at a reasonable time; and that the officer making the entry must, if required, produce the duly authenticated document showing his authority to anyone reasonably requiring him to do so. A police officer, seeing a forcible entry being made might, and probably should, require the production of this document. A neighbour or other lawful citizen suspecting a possible felony might also properly do so. It is intended as a safeguard against unlawful entry being made by persons pretending to be officers of the gas board.

The plaintiff's counsel conceded that it was not sufficient for his purpose to argue that the paragraph only required production to some person inquiring by what authority the officer was forcing an entry. That construction of the paragraph would not of course suffice for his purpose since the evidence in this case established as part of the plaintiff's case that the board's officer making the entry did produce his document of authority duly authenticated to the only person who questioned his action, namely the plaintiff's neighbour, Mrs. Murrells.

For the reasons which I have given I am of opinion that para. 34 is not confined to an entry on or after production to the occupier of the duly authenticated document giving the officer entering authority. The evidence established that, throughout the thirty-five years' experience in the gas industry of the defendant board's general manager, the power to enter forcibly had been exercised as a matter of course and in the belief that it was legal under the Acts governing the industry which preceded the Gas Act, 1948. In my view that belief was well founded because those Acts were intended to give the gas undertakers of those days the right so to enter. It was with knowledge of the powers conferred by the former Acts and of the way in which those Acts had been interpreted by those engaged in the industry, that Parliament passed the Gas Act, 1948.

For the reasons given I do not think the wording of para. 34 of Sch. III to the Act of 1948 forces the conclusion that the power to enter for such important matters as those referred to in that paragraph was intended to be altered and restricted as the plaintiff contends, or to be substantially different from the power previously given by statute to gas undertakers. Gas is supplied under pressure and is a potential danger, and it is important in the interests of the public that the gas boards, who are under a statutory obligation under para. 8 of the same Sch. III to maintain a continuous supply, should have powers sufficient to enable them at all reasonable times to get into premises for the purposes, among others, of inspecting such things as meters, pipes and connexions.

There is nothing novel in the conferring of such a right to enter on a public body where there is a public interest to be protected. Examples of power to enter premises are to be found for instance in the Public Health Act, 1875, s. 137, and the Rats and Mice Destruction Act, 1919, s. 5.

One other matter must be borne in mind. The defendant board had no power to cut off the supply of gas to the plaintiff's premises until the plaintiff chose to give them admission. The Act of 1948 only makes provision for the discontinuance by the board of the supply of gas in eight cases, no one of which was applicable. Those eight cases are under Sch. III, paras. 8 (6.), 14 (1.), 15 (2.), 25, 26 (1.), 27 (5.), 28, and 29 (2.), and I need not consider them in detail save to point out that para. 26 (1.), which gives power to discontinue for non-payment, has no application to such a case as the present where the plaintiff paid in advance for any gas he consumed by putting the appropriate coin into the box which the board provided. The board had no power to discontinue the plaintiff's supply of gas merely because they

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were unable to get admission to the premises. There must therefore be judgment for the defendant board on the claim for trespass.

The defendant board has, however, made a counterclaim for damages for breach of contract, alleging that there was an express term of the plaintiff's contract for the supply of gas by the Tottenham and District Gas Company, and that all the property, rights, liabilities and obligations of that company as gas undertakers became vested in the defendant board by virtue of the provisions of the Gas Act, 1948; alternatively, that it was an implied term of the contract that the board's officers should have free access at all reasonable times to clear the plaintiff's coin-box. The counterclaim has never been put forward as more than a claim for nominal damages, and, although the defendant board has insisted upon a decision upon it, it is a matter of very minor importance. As it happens in the circumstances it falls to be decided on a point of pleading, and so decides no matter of principle.

[His Lordship considered the point, and concluded:] As the matter is one of nominal damage only, and in the circumstances could not, I think, be made the subject of a decision which would be of any use, I decide it on the ground that the board have never afforded any evidence of the contract upon which they rely to support their counterclaim, and there must be judgment for the plaintiff on the defendants' counterclaim.

Judgment accordingly.

Solicitors: *Hamilton-Hill & Evershed; Avery, Son & Fairbairn*

1951
June 8.

Roxburgh, J.

THOMPSON *v.* EARTHY.

[1950 T. No. 1611.]

Vendor and Purchaser—Sale of house with vacant possession—Vendor's wife remaining in occupation—Desertion by vendor—Vendor's undertaking to justices to allow continuance of wife's occupation—Purchaser's claim for possession.

A deserted wife who remains on in occupation of the matrimonial home does not acquire any legal or equitable interest in the premises so as to bind them in the hands of a purchaser.

Where, therefore, a husband who is in desertion sells the house constituting the matrimonial home, the purchaser, on proof of his title, is entitled to an order for possession against the wife who has remained in occupation of the premises, and that is so notwithstanding that the husband has given an undertaking to the justices that her occupation may continue.

Old Gate Estates, Ld. v. *Alexander*, [1950] 1 K. B. 311 considered.

ACTION tried by Roxburgh, J., sitting as an additional judge of the King's Bench Division.

The plaintiff sought an order for possession of a freehold dwelling-house, and damages for trespass and/or use and occupation from June 17, 1950, until possession.

On June 17, 1950, the owner had conveyed the freehold reversion of the house, subject to certain mortgages, to the purchaser on payment of a certain sum. The defendant, who was the wife of the vendor, had at all material times been, and still was, in occupation of the house.

Roxburgh, J., said that he was prepared to accept the following statements from the defence for the purposes of his judgment, although they had not been proved in evidence:—The wife had lived in the house since her marriage to the vendor on November 27, 1935, and the house had constituted the only matrimonial home. On July 25, 1946, the vendor had deserted his wife and had gone to live elsewhere. He had never returned to the matrimonial home, and remained in desertion. On October 20, 1946, the justices sitting at Uxbridge in Middlesex found the vendor guilty of desertion and awarded custody of the three children to the wife; and, on his undertaking to allow her and the children to remain in occupation of the matrimonial home free of rent and all outgoings, the justices ordered him to pay his wife maintenance of 1*l.* a week only, and 5*s.* a week only for each of the children.

It was alleged by the wife that the purchaser, or her solicitors, knew of these matters before she acquired any beneficial interest or title to the house (which was not admitted). The wife contended, therefore, that the purchaser's title, if any, was subject to her interest, and that she was entitled to remain in possession until the vendor provided her and her children with an alternative home.

Michael Hoare, for the purchaser, opened the case on the facts.

Jellinek, for the wife. [He was asked to address the court first on the law.] A husband is bound to provide a home for his wife and children. That obligation is not discharged by his desertion. He has no right to turn his wife out of the matrimonial home when she is not at fault. His only remedy lies under s. 17 of the Married Women's Property Act, 1882; that remedy is a discretionary one which, it is submitted, the court would not exercise here in the husband's favour: see *H.* v. *H.* (1).

A husband cannot bring an action for possession against his wife on the ground that she is a trespasser, as he cannot sue her in tort: see *Bramwell* v. *Bramwell* (2).

Old Gate Estates Ld. v. *Alexander* (3) was a decision under the Rent Restriction Acts, but Denning, L.J., said there that a wife was in a special position in the matrimonial home, and that her husband was "not entitled to tell her to go without seeing "that she has a proper place to which to go". In fact she is entitled to stay until the court puts her out: see *Middleton* v. *Baldock* (4).

It is submitted that the wife's right to remain in the matrimonial home creates an interest in the premises. No such equitable right has yet been recognized, but the court is asked to create it. The existence of such a right should be inferred from the new principles uttered by Lord Goddard, C.J., in *Bramwell* v. *Bramwell* (5) and by Denning, L.J., in *Old Gate Estates Ld.* v. *Alexander* (6).

Hoare was not called upon to address the court.

ROXBURGH, J. The position of a wife who remains in a matrimonial home which has been deserted was stated by Denning, L.J., in *Old Gate Estates Ld.* v. *Alexander* (6). That particular case was one under the Rent Restriction Acts. Denning, L.J., said: "If a statutory tenant goes out of occupation, leaving "lodgers or sub-tenants or no one in the house, he ceases to be "entitled to the protection of the Rent Restriction Acts; but he "does not, in my opinion, lose the protection if he goes out, "leaving his wife and furniture there. The reason is because "the wife, so long as she is behaving herself properly, has a very "special position in the matrimonial home. She is not the sub-"tenant or licensee of the husband. It is his duty to provide a "roof over her head. He is not entitled to tell her to go without "seeing that she has a proper place to which to go. He is not "entitled to turn her out, without an order of the court: see

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(1) (1947) 63 T. L. R. 645.
(2) [1942] 1 K. B. 370, 374.
(3) [1950] 1 K. B. 311, 319.
(4) [1950] 1 K. B. 657, 668.
(5) [1942] 1 K. B. 370, 374.
(6) [1950] 1 K. B. 311, 319.

"*H.* v. *H.* (7). Even if she stays there against his will, she is "lawfully there; and so long as she is lawfully there the house "remains within the Rent Restriction Acts after he leaves, just "as it does after he is dead. She can pay the rent and perform "the obligations of the tenancy on his behalf, and the landlord "can only obtain possession if the conditions laid down by the "Acts are satisfied".

I understand Denning, L.J., there to be saying two separate things: one is that the husband has a marital duty or matrimonial duty to provide a roof over his wife's head; the other is that, as a husband cannot sue his wife in tort at common law, if he seeks to eject her he must have recourse to s. 17 of the Married Women's Property Act, 1882, and, if he does so, the court has a discretion. In other words, the wife has no right to remain. The husband has no right to turn her out, but the court, in considering how it ought to exercise its discretion under the Married Women's Property Act, would, of course, bear in mind the matrimonial duty to which Denning, L.J., has referred.

But this is not a case between husband and wife at all. So far as I know, there is no legal obstacle to prevent the purchaser from bringing an action in tort against the wife. The real question is whether or not the wife has any legal or equitable interest in the premises which runs with the premises so as to bind them in the hands of a purchaser. I have never heard of, and no authority has been cited to me which suggests that there is, any estate or interest in land of this character. On the contrary, the authorities which have been cited to me suggest, though they do not decide, that there is not. For instance, Denning, L.J., in *Old Gate Estates Ld.* v. *Alexander* (8), was careful to point out that the wife is not the sub-tenant or licensee (and it is the word "licensee" that I desire to stress) of her husband.

In those circumstances I should pause long before declaring the existence of a new species of equitable right hitherto never suggested; and I should be particularly slow to do such a thing when I realize that the vendor, at any rate, has a remedy under the Married Women's Property Act. The court may not exercise it in his favour, but he has a right to apply to the court for possession against his wife under that Act, and the court may or may not exercise the discretion in his favour. But the purchaser could not apply under that Act; and therefore, if I were to invent this new equitable interest, she would be in a worse position than the vendor from whom she has purchased.

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(7) 63 T. L. R. 645.

(8) [1950] 1 K. B. 319.

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In these circumstances I decline to declare the existence for the first time of a suggested equitable interest for which there is no previous authority whatever. The position is that the purchaser has proved her title to the land. The wife has proved no estate or interest, legal or equitable, in the land. She is accordingly a trespasser, and I must order her to deliver up possession to the plaintiff.

An order for possession was made as from December 7, 1951, and the purchaser agreed to waive any damages up to that date.

Judgment for the plaintiff.

Solicitors: *Warmingtons; Reginald Johnson & Co.*

I. G. R. M.

C. C. A.

1951

June 4, 13.

Lord Goddard, C.J., Lynskey and Devlin, JJ.

REX *v.* GUNEWARDENE.

Criminal law—Evidence—Admissibility—Evidence to discredit opposing witness—Whether confined to general reputation for truthfulness and honesty—Admissibility of personal belief of discrediting witness—Grounds for belief—Admissibility in chief.

Joint trial—Statement of one prisoner admitting guilt and incriminating other—Whole statement admissible if proper warning given to jury.

The credit of any witness may be impeached by the opposite party by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not, on their examination in chief, give reasons for their belief, but they may be asked those reasons in cross-examination, and their answers cannot be contradicted.

At the trial of a prisoner for manslaughter, counsel on his behalf sought to call a doctor to give evidence to discredit a witness for the prosecution. Before calling him counsel informed the judge that the doctor's evidence would be to the effect that he, as a medical man, had examined the witness and had come to the conclusion that he was suffering from a disease of the mind and that he (the doctor) would therefore not regard his testimony as reliable. The judge considered that evidence to be inadmissible.

Held, that the doctor could state his individual opinion but not the facts on which it was founded, and that the evidence which he proposed to give was accordingly inadmissible.

There is no rule of law which prevents from being given in evidence the statement of one prisoner which implicates another prisoner tried jointly with him.

Appeal against conviction.

The appellant, Sumatalage Reginald Gunewardene, a medical practitioner, was convicted of manslaughter at the Central Criminal Court together with Alice Hanson, and was sentenced to three years' imprisonment. The case made against the appellant was that he was an accessory before the fact to an operation to procure an abortion on a woman who had died as the result of it, and that he was therefore a principal in the second degree.

At the trial the prosecution put in a statement which Alice Hanson had made to the police admitting that she had performed the operation on November 13, 1950, and incriminating the appellant. The prosecution's case against the appellant was that he had driven the deceased woman, who was then pregnant, to Alice Hanson's house in order that the operation should be performed, that he drove her back again, and that he later attended her at the house of one of his patients. On November 15 he caused her to be taken to hospital but on her way there she died from general septicæmia.

The appellant denied the case made out by the prosecution except in so far as he admitted attending the deceased woman for what, he alleged, he thought was a normal miscarriage. His real defence was one of alibi at the material times.

At the trial the prosecution called a witness of the name of Davies who gave evidence highly prejudicial to the appellant. After the appellant had given evidence, his counsel wished to call a doctor to testify as to Davies' reliability as a witness, and told the judge that he intended calling the doctor to give evidence of the condition of Davies' mind. When counsel for the prosecution objected, counsel for the defendant submitted that the evidence was admissible on the ground of general reputation for truthfulness and honesty. He later withdrew the word "general" and said: "I am going to call this doctor to prove whether or not "Davies is suffering from a particular mental state. I propose "to ask what that mental state is, what the effect of it is; and "whether his evidence is to be rejected thereafter is a matter of "inference for the jury".

The judge held that the evidence was inadmissible, and the doctor was not called.

There were three grounds for the appeal against conviction: that the judge wrongly refused to admit the evidence of the doctor to discredit the witness for the prosecution; that that part of Alice Hanson's statement which incriminated the appellant ought not to have been read; and misdirection, which ground does not call for report.

D. N. Pritt, K.C., and *Eric Myers* for the appellant.

The evidence of the doctor was admissible to discredit the evidence of Davies. The law is correctly stated in *Reg.* v. *Brown and Hedley* (1), where the court observed that the practice of calling witnesses to prove that they would not believe the opposing witnesses on their oaths was an ancient one. A witness may be called to say that he knows a previous witness and would not believe him on his oath. In *Mawson* v. *Hartsink* (2), which is not such a strong case, Lord Ellenborough allowed the question to be put in this way: "Have you the means of knowing what "the general character of this witness was? And from such "knowledge of his general character, would you believe him on "his oath?".

[LYNSKEY, J. Have the cases gone further than allowing evidence of a witness's reputation?]

A witness is entitled to say that from this knowledge of another witness he would not believe him on his oath. The discrediting witness must have some means of knowledge. There is apparently no authority on the calling of a psychiatrist to say that he does not know a witness but that he has watched him giving evidence and has come to the conclusion that he is mad.

[LORD GODDARD, C.J. In *Reg.* v. *Brown and Hedley* (1) and *Mawson* v. *Hartsink* (2) the court was only concerned with evidence of general reputation.]

If a man, because of his mental state, is in the habit of making extravagant statements, that is surely part of his general character.

The cases make it clear that the doctor could have been asked, and could have answered, this question: "From your knowledge of "the witness Davies, is his evidence worthy of being believed?". The word "reputation" is used in many of the cases as contrasted with going into particular facts, which is not allowed. There are two distinct fields in this inquiry. The first, with which the court is not here concerned, is that evidence that a prisoner is of good character must be limited to general reputation; and accordingly any rebutting evidence must be subject to the same limitation. The second field, which is the only one here in point,

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(1) (1867) L. R. 1 C. C. R. 70.

(2) (1802) 4 Esp. 102.

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is that it is a general rule of law, not limited to criminal trials, that evidence to discredit an opposing witness is of the personal opinion of the discrediting witness and is not confined to evidence of the general reputation of the witness whom it is sought to discredit. The discrediting witness speaks of his personal opinion from his knowledge of the other person, although evidence in chief of particular facts is never admissible.

This distinction between the two fields was pointed out in *Reg.* v. *Rowton* (3) which concerned the rule applicable only to criminal law. In reply to a statement by counsel that there was no distinction in principle between evidence as to the character of a witness and of a prisoner, Cockburn, C.J., said (4) that the cases were essentially different; that, in the case of the character of a witness as to his credibility on oath, the individual opinion of another was what was sought; but that in the case of a prisoner the general opinion of his character was the important matter.

The best treatment of the subject in the text books is in Roscoe's Evidence in Civil Actions (20th ed.) Vol. I, p. 187, where the question is put thus: "From your knowledge of the "witness do you believe him to be a person whose testimony is "worthy of credit?".

Mawson v. *Hartsink* (5) falls into place after certain other cases are considered: *Rex* v. *Watson* (6) *per* Bayley, J.; *Sharp* v. *Scoging* (7) where Gibbs, C.J., said that, in seeking to discredit a witness, another witness could be asked the general question whether he would believe the first witness on his oath; *Rex* v. *Rudge and Another* (8) where Lawrence, J., said that the only way in which a witness could be discredited was by general evidence of persons who were acquainted with him, as to their belief of his credibility on his oath; and *Stebbings* v. *London and North-Western Railway Co.* (9).

The doctor's evidence would have been "general" for two reasons: it does not seek to investigate particular facts in evidence in chief; and it follows exactly the general form of the question which the cases show to be admissible. This little field, which is limited by the older cases, is a valuable one and does not lend itself to abuse. [*Mawson* v. *Hartsink* (10) further referred to.]

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(3) (1865) 34 L. J. (M. C.) 57.
(4) Ibid. 59.
(5) 4 Esp. 102.
(6) (1817) 2 Stark. 116, 152.
(7) (1817) Holt, N. P. 541.
(8) (1805) Peake Add. Cas. 232.
(9) (1899) 63 J. P. 138.
(10) 4 Esp. 102.

[LORD GODDARD, C.J. That case does not really support the passage in Roscoe for which it is given as an authority. It may be that there has been a relaxation of the rule since that case.]

Rex v. *Davison* (11) and *Reg.* v. *Rowton* (12) are both in the other field which is inapplicable here. [Counsel referred to Stephen's Digest of the Law of Evidence (12th ed.), Arts. 57 and 146; Russell on Crimes (8th ed.), pp. 1955 and 1074; and *Rex* v. *Bispham* (13).]

Although in a joint trial there are necessarily some disadvantages, it was quite unnecessary for the whole of Alice Hanson's statement to be read out. The prosecution should have omitted those passages which merely referred to the appellant's alleged part in the crime.

Christmas Humphreys for the Crown.

It was in *Rex* v. *Rookwood* (14) and *Rex* v. *Layer* (15) that the general proposition was laid down. If the doctor's evidence had been admitted, the prosecutor would have been entitled to call witnesses to say that Davies was not mad, and so on ad infinitum.

[DEVLIN, J. That could only be done once.]

Yes, but once to every matter investigated, which would be completely impracticable: see *Attorney-General* v. *Hitchcock* (16), *per* Rolfe, B. (17). *Rex* v. *Hardy* (18) was quoted in *Reg.* v. *Rowton* (19): " Character is the slow-spreading influence " of opinion arising from the deportment of a man in society; " as a man's deportment, good or bad, necessarily produces one " circle without another, and so extends itself till it unites in one " general opinion, that general opinion is allowed to be given in " evidence ".

The cases show that a discrediting witness may be called to speak of another witness's general reputation which is within his own knowledge; but the evidence which it was proposed to obtain from the doctor here was not evidence of general reputation, but merely of his own medical opinion: see *Clarke* v. *Periam* (20) and *Martyn* v. *Hind* (21). *Rex* v. *Jones* (22) is an authority for preventing counsel from putting particular questions to a discrediting witness.

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(11) (1808) 31 St. Tr. 99.
(12) 34 L. J. (M. C.) 57.
(13) (1830) 4 C. & P. 392.
(14) (1696) 13 St. Tr. 139.
(15) (1722) 16 St. Tr. 94.
(16) (1847) 11 Jur. 478.
(17) Ibid. 482.
(18) (1794) 24 St. Tr. 199.
(19) 34 L. J. (M. C.) 58.
(20) (1742) 2 Atk. 337.
(21) (1776) 2 Cowp. 437.
(22) (1809) 31 St. Tr. 251.

There are no modern cases. *Rex* v. *Bispham* (23) shows that the " general character " of the witness to be discredited is the vital matter. *Reg.* v. *Burt* (24) was decided before the Criminal Evidence Act, 1898. In Cockle's Cases and Statutes on Evidence (7th ed.), at p. 314, it is stated: " Evidence to " discredit a witness is admissible to prove:—that he has such a " general bad character for veracity that he is not to be believed " on his oath ". Wherever the word " general " is used in the authorities, it means that general evidence may be given in the sense that a witness may only say what is the general reputation of a previous witness.

Alice Hanson's statement was admissible in full, and in fairness to her it was proper for the prosecutor to read the whole of it. In the absence of any application by the defence it was not for the prosecution to pick and choose how much of the statement should be read.

Pritt, K.C., replied.

Cur. adv. vult.

Lord Goddard, C.J. [delivering the judgment of the court:] The appellant was convicted of manslaughter and was sentenced to three years' imprisonment. At the end of the argument the court dismissed his appeal against conviction and intimated that they would give their reasons later. On reflection the court desired fuller consideration of the cases bearing on the admissibility of certain evidence so the order was not drawn up, and a further argument has now been addressed to us.

[His Lordship stated the facts and continued:] Some points as to misdirection were taken which, Mr. Pritt frankly admitted, were only minor points, and it is sufficient to say with regard to them that the court is of opinion that not only was there no misdirection but that the judge's summing-up was fair and adequate and not open to criticism in any respect.

As regards the first of the main questions which was argued, Davies, who was the brother of Mrs. Hanson, was called to prove that the appellant had bribed, or attempted to bribe, Mrs. Hanson to withdraw the statement she had made to the police and to say that she had made it in a moment of panic and that it was untrue. There is no doubt that the evidence of this witness was highly prejudicial to the appellant. He was severely and properly cross-examined with a view to showing that he was not a witness of truth, and he admitted that he had lied on many occasions. His evidence was wholly denied by the appellant, and after the latter's evidence his counsel desired to call a doctor to give evidence, as he put it, on Davies' reliability as a witness. When counsel for the Crown objected to this evidence, counsel for the appellant, said: "My Lord, I submit it is admissible on the "ground of general reputation for truthfulness and honesty". He had previously told the judge that he intended calling this doctor to give some evidence about the condition of Davies' mind. When Hilbery, J., said that the evidence would not be that of general reputation, counsel for the appellant said: "My "Lord, with respect, reputation. I drop the word 'general'"; and later he said: "I am going to call the doctor to prove whether "or not he is suffering from a particular mental state. I propose "to ask what that mental state is, what the effect of it is, and, "my Lord, the question of whether his evidence is to be rejected "thereafter is a matter of inference for the jury". The judge held that this evidence would be inadmissible, and accordingly the witness was not called.

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(23) 4 C. & P. 392.

(24) (1851) 5 Cox C. C. 284.

The question raised is of some importance on the extent to which evidence may be given to discredit witnesses called by the opposing party. That witnesses can be called to say that they would not believe a particular witness called by the other side, whether for the prosecution in a criminal case or for a party in a civil case, is, in the opinion of the court, undoubted; but the nature of the discrediting evidence and how far the witness can go in stating the grounds for his belief are the matters which the court has to determine.

It does not seem open to doubt that the true rule with regard to the character of a prisoner is that a witness must speak of the prisoner's general reputation and not of particular facts known to the witness on which he bases his opinion. If, for instance, a witness were to say that he knew nothing of the general character of the prisoner but that he had had abundant opportunity of forming an individual opinion as to his honesty, such evidence would be inadmissible. That was expressly decided in *Reg.* v. *Rowton* (25), though the court there did hold that it is open to a witness to say: "I have never heard anything against the "character of the person of whose character I have come to "speak", since the fact that a prisoner's character has never come into issue or discussion may be the most cogent evidence that his reputation is good.

(25) 34 L. J. (M. C.) 57.

The case on which Mr. Pritt principally relied was *Reg.* v. *Brown* (26), where counsel for the defendants proposed to call witnesses to prove that they would not believe the witnesses for the prosecution on their oaths. Counsel for the prisoner cited *Mawson* v. *Hartsink* (27) and was then stopped by the court. Counsel for the Crown submitted that to allow such a question would be contrary to *Reg.* v. *Rowton* (25), but the report states (28): "The court, however, declined to hear any further "argument on the subject, observing that all the text-writers were "agreed that the evidence could be given, and that the practice "was so ancient, and hitherto so undoubted, that it could not be "altered now unless by the authority of the legislature". That case, therefore, appears to be a direct authority that a witness called to impeach the credibility of previous witnesses can express an individual opinion and is not confined to giving evidence of the latter's general reputation.

It is to be observed that in *Reg.* v. *Rowton* (29) counsel is reported as arguing, "There is no distinction in principle between "evidence as to the character of a witness and of a prisoner", to which observation Cockburn, C.J., replied: "The cases are "essentially different. In the case of the character of a witness "as to his credibility on oath, the individual opinion of another "is what is sought. In such case the witness could not say the "general opinion is that the man ought not to be believed on his "oath. But in the case of a prisoner what is the general opinion "of his character is what is to be proved".

The court asked for re-argument in this case with a view to examining other and earlier authorities on the matter and to seeing if the witness called is confined to stating his individual opinion or whether he may go into any reasons which led him to form that opinion. There is no need to consider all the cases to which our attention has been called by counsel on either side although the court is indebted to them for their full and careful survey of the authorities.

The first case to which it is necessary to refer is *Rex* v. *De La Motte* (30), a trial for high treason at which Buller, J., presided. In his charge to the jury, the judge said (31): "These "are the three witnesses called to impeach the credit of Lutterloh. "The witness Lappel said he rather doubted whether he would "trust or believe him. The counsel for the defendant did not put

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(26) L. R. 1 C. C. R. 70.
(27) 4 Esp. 102.
(28) L. R. 1 C. C. R. 71.
(29) 34 L. J. (M. C.) 59.
(30) (1781) 21 St. Tr. 687.
(31) Ibid. 811.

"the question in the manner the question always is, and ought to "be, put if they mean to impeach the veracity of a witness; and "every day's experience teaches the gentlemen at the bar how "they ought to put the question, if they think the answer will "serve their purpose; for the question was never asked of any "witness, whether he thought this man from his general character "deserved to be believed upon his oath. The only question at all "like that was put to Lappel, with this addition, whether he "would trust or believe him". It would therefore seem that the judge's opinion was that a witness called to impeach testimony was confined to giving evidence as to general reputation and could not state his individual opinion.

But later cases show that the rule has at any rate been relaxed, though Lord Ellenborough seems to have taken much the same view in *Mawson* v. *Hartsink*, where, after some discussion, he allowed the question to be put in this way (32): "Have "you the means of knowing what the general character of this "witness was? and from such knowledge of his general character, "would you believe him on oath?" That case was decided in 1802, and two years afterwards, in *Carlos* v. *Brook* (33), Lord Eldon said that a witness may be asked whether he would believe a man on his oath, but it is not competent to ask him the ground of his opinion.

This question was again much discussed in *Rex* v. *Watson* (34). The main question seems to have been whether, for the purpose of discrediting a witness, it could be asked if he had been convicted of an offence without producing a record of the conviction. That question can no longer arise as the matter is covered by s. 6 of the Criminal Procedure Act, 1865, usually referred to as Denman's Act. But the judgments in *Rex* v. *Watson* (34) clearly show that all the judges were of opinion that, while a witness could be called to say that he would not believe a previous witness on his oath, he cannot in chief give evidence of particular facts as justifying his opinion.

There is certainly nothing inconsistent with this view in *Reg.* v. *Brown* (35), and in our opinion the effect of the cases is thus correctly stated in Stephen's Digest of the Law of Evidence (12th ed.), Art. 46: "The credit of any witness may be impeached "by the opposite party, by the evidence of persons who swear that "they, from their knowledge of the witness, believe him to be

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(32) 4 Esp. 103.
(33) (1804) 10 Ves. 49.
(34) 2 Stark. 116, 149.
(35) L. R. 1 C. C. R. 70.

"unworthy of credit upon his oath. Such persons may not upon "their examination in chief give reasons for their belief, but they "may be asked their reasons in cross-examination, and their "answers cannot be contradicted ".

The reason for the limitation which is imposed upon the evidence that the witness can give is obvious. Were it otherwise an issue would at once arise whether the facts upon which the witness stated he based his opinion were true or otherwise. The issue before the court in a criminal trial is simply whether or not the prisoner has committed the offence with which he is charged. The court cannot at the same time have to try the question whether or not certain facts spoken to with regard to a witness were true or not, nor would there be any means of obtaining the opinion of the jury upon that question.

In the present case, had counsel at the appellant's trial called the doctor, the most that he could have asked him in chief was: "From your knowledge of the witness Davies would you "believe him on his oath?" But this was not what counsel desired to do. He was perfectly frank with the judge and told him that he wished to call the doctor to say that he, as a medical man, had examined the witness and had come to the conclusion that the man was suffering from a disease of the mind and that therefore he regarded his testimony as unreliable. In our opinion that is exactly what the cases show cannot be done. He can state his individual opinion, but not the facts upon which it is founded, and this case is a good illustration for the reason of the limitation placed upon this class of evidence to which we have already referred. In common fairness to the witness, if that evidence were given he might have wished evidence called to prove that he was not suffering from any disease of the mind, and the case against the prisoner could not be complicated by having a trial of this wholly irrelevant issue as to the sanity or insanity of a particular witness.

This case does, perhaps, illustrate the desirability of adhering strictly to the rule that no ruling should be given upon the admissibility or otherwise of evidence until the particular question is asked; but, bearing in mind the avowed reason which counsel gave for desiring to call the witness, we do not, in this particular case, wish to be thought to be making any unfavourable comment on the course adopted. It is abundantly clear that if the witness had been called the only object in calling him was to have evidence by a medical man as to the result of an examination he had made of a witness and the opinion he had formed thereon which, as we have already said, was inadmissible. In our opinion, both on principle and authority, such evidence was inadmissible.

We now turn to the second of the main questions argued on behalf of the appellant. As we have said, there is no doubt that the statement made by the prisoner Hanson incriminated the appellant in a high degree. This is a matter of very frequent occurrence where two or more prisoners are charged with complicity in the same offence. This state of affairs is no doubt a ground upon which the judge can be asked to exercise his discretion and order a separate trial, but no such application was made in the present case. If no separate trial is ordered it is the duty of the judge to impress on the jury that the statement of one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded, and that warning was emphatically given by Hilbery, J., in the present case. But it would be impossible to lay down that where two prisoners are being tried together counsel for the prosecution is bound, in putting in the statement of one prisoner, to select certain passages and leave out others.

As Alice Hanson had pleaded not guilty, counsel for the prosecution was bound to prove the case against her, and, so far as she was concerned, the evidence mainly consisted in the statement which she had made. The judge not only warned the jury that they must not regard her statement as evidence against the appellant but was at pains not to read, in his summing-up, the whole of the statement which she made, confining himself to those parts which bore on her guilt and not on that of the appellant, though he did read one passage which implicated the appellant, again warning the jury that it was not evidence against him. He went so far as to advise the jury not to ask for the woman's statement when they retired, so that they should not have before them matter prejudicial to the appellant.

If we were to lay down that the statement of one prisoner could never be read in full because it might implicate, or did implicate, the other, it is obvious that very difficult and inconvenient situations might arise. It not infrequently happens that a prisoner, in making a statement, though admitting his or her guilt up to a certain extent, puts greater blame upon the co-prisoner, or is asserting that certain of his or her actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the crime. In such a case that prisoner would have a right to have the whole statement read and could, with good reason, complain if the prosecution picked out certain passages and left out others. The statement was clearly admissible against Hanson and was read against her, and although in many cases counsel do refrain from reading passages which implicate another prisoner and have no real bearing on the case against the prisoner making the statement, we cannot say that anything has been admitted in this case which was not admissible, and the judge gave adequate and emphatic directions to the jury on the subject.

For these reasons we have come to the conclusion, on both grounds, that the appeal fails and must be dismissed, but in the circumstances the sentence will date from conviction.

Appeal dismissed.

Solicitors: *Darracotts; Director of Public Prosecutions.*

S. C.

REX *v.* WEISZ AND ANOTHER.
Ex parte HECTOR MACDONALD LD.

1951
June 19, 20, 28.

Lord Goddard, C.J., Hilbery and Devlin, JJ.

Contempt of Court—Gaming debt—Specially indorsed writ for account stated—Indorsement fictitious—Respondents ignorant of indorsement—Solicitor's responsibility for acts of firm—"Showing up" action not per se a contempt.

To attempt to deceive the court by disguising the true nature of the claim by the indorsement on a specially indorsed writ is a contempt of court.

A solicitor was instructed by a client to bring an action against bookmakers for money alleged to be owed by them to the client on bets. The client insisted on the action being brought, although he knew that it was not maintainable in law, in the hope that the threat of publicity would induce the bookmakers to pay, or, if they did not, for the purpose of "showing them up". Accordingly, a specially indorsed writ was issued against the bookmakers by which the money was claimed to be due on an account stated. No account had been stated, as the solicitor knew. The client did not know of the terms of the indorsement.

Held, that the solicitor had committed a contempt of court because the indorsement on the writ was fictitious and was designed to conceal from the court the true nature of the claim; but that the

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client had not committed a contempt, for to bring an action prohibited by the Gaming Act, 1845, although an abuse of the process of the court, was not of itself a contempt, even though it were brought to put pressure on the bookmakers or to "show them up", and the client was not responsible for the terms of the indorsement on the writ.

APPLICATION for a writ of attachment for contempt of court.

The respondent Weisz had a credit account with the applicants, Hector MacDonald Ld., bookmakers, and placed bets on horse and other races with them from time to time. On these bets he alleged that they owed him a balance of 373*l*. 13*s*. 4*d*. at the beginning of August, 1950, which the applicants denied. Weisz accordingly lodged a complaint with Tattersalls' committee, which decided in favour of the applicants.

Weisz then consulted the second respondent, a partner in a firm of solicitors, with a view to bringing an action against the applicants. The respondent solicitor advised Weisz that such an action was hopeless and did his best to dissuade Weisz from taking legal proceedings; but at length he agreed and sent the correspondence to counsel (not being one of the counsel engaged in the present application) with instructions to settle the indorsement for a writ.

Accordingly on January 22 a writ was served on the applicants, the indorsement being in the following terms:—"The plaintiff's "claim is for 373*l*. 13*s*. 4*d*. being the balance found to be due "from the defendant to the plaintiff on accounts stated between "them in writing and contained in a letter from the plaintiff to "the defendant dated September 26, 1950". "Particulars:— "September 26, 1950, Balance due by defendant to plaintiff on "this date 373*l*. 13*s*. 4*d*.".

That indorsement was signed in the name of the second respondent's firm.

The respondent solicitor was not personally aware of the terms of the indorsement, and Weisz was abroad when the writ was issued and also did not know of its terms.

The applicants now applied for a writ of attachment against the respondents on the following grounds (which were set out in the statement in support of their application):

(*a*) The respondents "well knew that no accounts had ever "been stated as in the said indorsement alleged or in any manner "at all and that the only transactions between" Weisz and the applicant company "had been gaming transactions". (*b*) The respondents "by indorsing the writ for an account stated "deliberately and dishonestly disguised the true nature of the

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"alleged claim in an attempt to deceive the court. (*c*) The issue "of the said writ was an abuse of the process of the court and "an attempt to impede the course of justice in that it was "designed to bring pressure on the applicants by the threat of "publicity to pay an alleged debt which was neither legally nor "morally due".

Gerald Gardiner, K.C., and *Quass* for the applicants. The writ was indorsed with a claim on an account stated, when the respondents knew that there had been no account stated, and knew that, even if there had been an account stated, that account would have been in respect of bets on horse and other races. Therefore the action was not one which lay, and it was framed as it was in order to deceive the court into thinking that it was an action which would lie.

There have been a series of actions stated to be on accounts stated in connexion with betting debts, but since the passing of the Gaming Act, 1845, no such action has succeeded. [Counsel referred in particular to *Alberg* v. *Chandler* (1); *Day* v. *William Hill* (*Park Lane*) *Ld.* (2); and *Law* v. *Dearnley* (3).] In *Gugenheim* v. *Ladbroke & Co. Ld.* (4) the Court of Appeal allowed such an action to proceed to trial; but that was because the plaintiff was a foreigner and would not have understood had the statement of claim been struck out, and the plaintiff afterwards failed at the trial. The cases which have been referred to followed as a result of that decision.

[LORD GODDARD, C.J. In reply to an inquiry which I have made I have learned that, if an action has been brought on a writ honestly indorsed as a claim for money lost in betting, in the hope that the defendant would not appear, and in fact he does not appear, judgment is not allowed to be signed, but the writ is sent to the practice master. The question is whether there is any justification for bringing an action on an account stated in respect of betting debts when Parliament has said that such an action shall not be brought.]

It is contended that the writ here was only indorsed as being a claim on an account stated in order to deceive the court, because otherwise the action would not be allowed to proceed. Here there was no relevant document which could constitute an account stated. That is in addition to the fact that, even if there were an account stated, it would be in respect of betting debts.

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(1) (1948) 64 T. L. R. 394.
(2) [1949] 1 K. B. 632.
(3) [1950] 1 K. B. 400.
(4) (1947) 177 L. T. 74.

The court will hardly require authority for the proposition that the court has an inherent jurisdiction to treat a feigned action as a contempt of court: see the first Statute of Westminster, 1275 (3 Edw. 1, c. 29), *Coxe* v. *Phillips* (5), and *In re Elsam* (6), and two more modern cases, *Linwood* v. *Andrews and Moore* (7), and *In re Septimus Parsonage & Co.* (8).

The present action was improperly brought to put pressure on the defendants in the hope that they would pay, and was deliberately stated to be on an account stated in order to deceive the court into thinking that the action would lie.

Fox-Andrews, K.C., and *James Burge* for the respondent Weisz. It is conceded that there was not in fact an account stated. But contempt of court involves a state of mind. No person can be treated as having committed a contempt unless he personally has committed a conscious, deliberate, and contumacious act. Weisz did not know of the indorsement on the writ, and, if he had, would have honestly thought that an account had been stated. To a layman an account stated means no more than a statement of account. Abuse of the process of the court and contempt are not the same thing; the latter can be committed, at any rate by a layman, only where there is a deliberate and contumacious act on his part.

From 1845 to 1951 there was no case where such an action as the present one was even referred to as a contempt. In the present case it is the indorsement of the writ, not the issue of it, which is the subject of complaint. It is conceded that the contents of the indorsement were an abuse of the process of the court, but there must be something more than that to constitute a contempt. There is no authority to show explicitly what that thing is, but all the cases of contempt (including those cited on behalf of the applicants) involved some definitely fraudulent or wrong intent. Weisz honestly thought that the money claimed by him was morally due to him; pressure to obtain what is morally due does not amount to a contempt.

The case must be decided on the basis, and only on the basis, of the statement put in under R. S. C., Ord. 59, r. 26, in support of the present application: see r. 6 (1) of that Order and *In re Pollard* (9). On the facts neither paras. (*a*) nor (*b*) of that statement can apply to Weisz. As to (*c*) there is no evidence that Weisz was actuated by any desire to utter a threat of publicity

(5) (1736) Cas. t. Hard. 237.
(6) (1824) 3 B. & C. 597.
(7) (1888) 58 L. T. 612.
(8) [1901] 2 Ch. 424.
(9) (1868) L. R. 2 P. C. 106.

or that the debt which he claimed was not morally due. *Rex* v. *Almon* (10) is the converse of the present case.

In *Rex* v. *Baines* (11) it was held that the service of certain writs of subpœna ad testificandum was an abuse of the process of the court; but it was not even suggested that that was a contempt. The jurisdiction to commit for contempt is one to be exercised with scrupulous care: Oswald on Contempt (3rd ed.), p. 7; *Reg.* v. *Gray* (12).

[DEVLIN, J. But those authorities are concerned only with a criminal contempt. They may not be relevant where the contempt does not amount to a misdemeanor at common law.]

It is conceded that an attempt to deceive the court by the special indorsement of a writ may be a contempt.

[LORD GODDARD, C.J. *In re Elsam* (13) is a strong case in that respect.]

That was decided in 1824. There is no similar reported case in modern times; none of the modern cases on the matter even suggest the possibility of contempt. It should be borne in mind that contempt is an offence sui generis and that its punishment involves in most cases an exceptional interference with the liberty of the subject: Oswald on Contempt (3rd ed.), p. 17. See also *per* Jessel, M.R., in *In re Clements* (14), approved by Mathew, J., in *In re Maria Annie Davies* (15).

An abuse of the process of the court should only be held to be a contempt where there is an element in it of wickedness; e.g., where two persons fraudulently conspire to claim something to which they know that they are not entitled and deceive the court.

The Statute of Frauds, 1677, s. 4, provides: "No action "shall be brought" on certain contracts unless they are evidenced in writing, but it is inconceivable that the bringing of such an action, notwithstanding that the contract in question was not evidenced in writing, would be held to be a contempt of court. The Gaming Act, 1845, s. 18, is in similar terms.

[LORD GODDARD, C.J. It would not be a contempt of court if the writ were specifically indorsed as a claim for gaming debts.]

Maude, K.C., and *Wishart* for the respondent solicitor. [They offered an apology to the court on his behalf.] As regards paras. (*a*) and (*b*) of the applicants' statement, the solicitor should be acquitted. As regards (*c*), *In re Elsam* (16) is a difficult case to distinguish. But the ordinary remedy in such a case is to apply to strike out the pleading: Halsbury, Laws of England (2nd ed.), vol. 7, p. 19. If such an abuse of the court's procedure is a contempt it is one in theory only: ibid., p. 24. There was mens rea in *In re Elsam* (16) which is not present in this case. It is always possible in such a case that the defendants will not plead the Gaming Act.

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(10) (1765) Wilmot's Notes of Opinions 243.

(11) [1909] 1 K. B. 258.

(12) [1900] 2 Q. B. 36, 41.

(13) 3 B. & C. 597.

(14) (1877) 46 L. J. (Ch.) 375, 383.

(15) (1888) 21 Q. B. D. 236, 239.

Gardiner, K.C., in reply. That the defendants may not plead the Gaming Act is not material; the court has jurisdiction to put an end to such an action on its own motion: *Kershaw* v. *Sievier* (17); *Luckett* v. *Wood* (18).

[Lord Goddard, C.J. Surely it is not a contempt to issue a writ specifically claiming money lost on bets on horse racing?]

It may not be; it might, however, be a contempt if the plaintiff knew that he had no legal claim and issued the writ for no other purpose than to force the defendant into court. That would be grossly improper. Here there was an element of wrongdoing on the part of both respondents.

Cur. adv. vult.

June 28. Lord Goddard, C.J., reading the judgment of the court, stated the facts and continued:—It was not disputed that the respondent Weisz knew perfectly well that an action against the applicants for money alleged to be won on bets was not maintainable at law. However, he insisted that one should be brought, obviously in the hope that the threat of publicity would induce the applicant bookmakers to pay or, if they did not, for the purpose of "showing them up".

The gravamen of the case against the respondent solicitor is that the indorsement on the writ was wholly fictitious and was designed to conceal from the court the true nature of the plaintiff's claim. It is abundantly clear that there never had been any account stated between the parties, even in respect of betting transactions. The account is said to be contained in a letter of September 26, and it is in issue whether that letter was ever sent to or received by the bookmakers. But assuming that it was, it is nothing but an allegation by Weisz that money was due to him and threatening to take proceedings to obtain it.

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(16) 3 B. & C. 597.

(17) (1904) 21 T. L. R. 40.

(18) (1908) 24 T. L. R. 617.

Anything further removed from a stated account cannot well be imagined. As it was not attempted by anyone to contend that there ever was an account stated between these parties we need not deal, in this case, with what is necessary to support such a cause of action. Its nature will be found fully discussed by Blackburn, J., in *Laycock* v. *Pickles* (19).

What we have to consider in this case does not depend in the least degree on any technical question as to the nature of an account stated; this was simply a naked action for the recovery of money alleged to have been won by betting which the Gaming Act, 1845, prohibits. Such an action is therefore an abuse of the process of the court, but it is not necessarily a contempt to bring it. But to attempt to deceive the court by disguising the true nature of the claim is a contempt. It is putting forward what the old cases called a feigned issue, that is to say, not the true but a fictitious cause of action. That this is a contempt is well illustrated by the two cases cited by counsel for the applicants: *Coxe* v. *Phillips* (20) and *In re Elsam* (21). The latter case, decided in 1824, is indeed a strong illustration of the necessity of being frank with the court. An executor desired to obtain the opinion of the court on a question of title, a matter which in modern times would be effected by means of an originating summons, a procedure then unknown. Accordingly he caused a special case to be stated, which consisted of an elaborate story which in fact was wholly fictitious. His good faith was unchallenged and it was not suggested that he had any motive other than to obtain a decision on an obscure point of law, but he was nevertheless fined for bringing a fictitious case before the court.

Counsel for the solicitor, who conducted this case with exemplary frankness and discretion, did not seek to justify this indorsement or to dispute that it in fact disclosed a fictitious case. He sought to mitigate what had been done, and it is no doubt matter of mitigation, and for myself I would say strong mitigation, that there are many cases to be found in the books in which this indorsement has been used in betting cases, and so far there has been at least no reported case in which it has been suggested that such a thing is a contempt, though the actions have been struck out as an abuse of process. Indeed, in *Gugenheim* v. *Ladbroke & Co. Ld.* (22), the Court of Appeal allowed the action to proceed apparently on the ground that the plaintiff was a foreigner who would, they thought, not understand the position and be aggrieved if the action were to be summarily dismissed, and this in spite of the great doubt expressed by Tucker, L.J., as to this course being allowed. I think that case should be regarded as wholly exceptional; it does appear from its subsequent history that a very serious issue of fraud had been raised which the foreign plaintiff was anxious to have determined, and when the case came to trial before Humphreys, J., the judge allowed that issue to be left to a jury, though he entered judgment against the plaintiff on the ground that it was a betting claim and without regard to the verdict.

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(19) (1863) 4 B. & S. 497, 506.

(20) Cas. t. Hard. 237.

(21) 3 B. & C. 597.

(22) 177 L. T. 74.

The very fact that on many previous occasions resort has been had to this particular form of indorsement in cases which are brought simply for the recovery of money won at betting or gaming is what gives importance to this present motion. It is time that this practice should be stopped, and in no uncertain manner. The mischief is obvious. Parliament has ordained that the courts are not to be used for this purpose. Many people may be deterred from defending such actions, if brought, for fear of publicity. If the writ were truthfully indorsed, for money won at betting, it would be wholly improper to allow a default judgment to be entered; the duty of the central office would be to bring the matter before the practice master and he, in his turn, ought not to, and I am sure would not, allow a judgment to be signed which would in effect be contrary to the provisions of the statute. If a writ is indorsed for a fictitious but apparently legal cause of action a default judgment could be signed as of course, and accordingly in our opinion this leads to an interference with or distortion of the course of justice.

In this connexion I ought to refer to an extract from the Law Society's Gazette exhibited to the respondent solicitor's affidavit, in which it is stated that if a defendant to proceedings issued in respect of a gaming debt is to succeed the statute must be pleaded, and *Willis* v. *Lovick* (23) is cited as authority. This is too wide a statement. The true rule is to be found in *North Western Salt Co. Ld.* v. *Electrolytic Alkali Co. Ld.* (24) and is succinctly stated in the headnote thus: "Where an action is "brought on a contract which is ex facie illegal . . . the court will "decline to enforce the contract, irrespective of whether illegality "is pleaded or not; but, where the question of illegality depends "upon the surrounding circumstances, as a general rule, the

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(23) [1901] 2 K. B. 195.

(24) [1914] A. C. 461.

"court will not entertain the question unless it is raised by the "pleadings". Scrutton, L.J., put it tersely in *Phillips* v. *Copping* (25), saying: "It is the duty of the court when asked "to give a judgment which is contrary to a statute to take the "point although the litigants may not take it". *Willis* v. *Lovick* (26) was an illustration of the second part of the rule stated in the *North Western Salt Co. Ld.* case (27). An agent sued his principal for commission on money received by the principal from persons introduced by the agent. The court held that if the defendant wished to say that the money had been received from persons betting with the defendant the Gaming Act, 1892, must be pleaded. But *Phillips* v. *Copping* (25) shows that if A sues B for money won by betting it is the duty of the court to refuse to give judgment for him as soon as it appears that the action is one prohibited by the Gaming Act, whether or not the Act is pleaded, and this shows how important it is that the claim should not be preferred under a feigned issue.

We do not think it necessary to go through the many cases cited in argument dealing with contempts of different kinds, nor is it necessary to remind the court that the summary jurisdiction to punish contempts is one to be exercised with caution. It is, in our opinion, beyond question that to disguise a cause of action so as to conceal its true nature when in truth it is one prohibited by statute is a contempt, and as the indorsement here was signed in the name of the respondent solicitor's firm, and he admits that he was the partner having charge of the proceedings, he must take responsibility and be held guilty of a contempt.

I now turn to the position of the respondent Weisz. That he insisted on an action being brought which was an abuse of the process of the court is clear, and, as it is admitted that he knew that betting debts could not be recovered by action, it follows that he knew that the action for which he gave instructions was an abuse. But it has never yet been held that merely to bring, or cause to be brought, an action which is an abuse can be treated as a contempt, even though it may have been brought for the purpose of pressure or what may be called "showing up". If it were held that to bring an action prohibited by the Gaming Act was punishable, it would mean that the court was treating as criminal something for which Parliament had not provided a penalty. As a general rule stopping the action in limine and awarding costs against the plaintiff must be regarded as the

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(25) [1935] 1 K. B. 15, 21.

(26) [1901] 2 K. B. 195.

(27) [1914] A. C. 461.

1951

Rex v. Weisz. *Ex parte* Hector MacDonald Ld.

appropriate sanction. There may be exceptions and, to give one instance, if a person who brought an action which was struck out as an abuse again brought exactly the same action, the court might deal with him for contempt, but that would be because his conduct in bringing the second action amounted to a defiance of the court. It is necessary to emphasize that the contempt in this case lies not in bringing an action forbidden by the Gaming Act but in bringing it as a feigned issue so as to conceal its true nature from the court. For this we cannot hold Weisz responsible. He instructed his solicitor to bring an action for the bets; had the writ been indorsed for money due to the plaintiff on bets won by him the action would have been struck out, but it would not have amounted to contempt.

Judgment accordingly.

Solicitors: *Ronald M. Simons; Campbell, Hooper & Todd.*

R. P. C.

1951
April 20.

Lord Goddard, C.J., Oliver and Cassels, JJ.

THOMAS *v.* DANDO.

Highway—Unfenced and unpaved forecourt outside corner shop—Use by customers of the shop—Unlighted vehicle parked on forecourt—Whether a "road"—Road Transport Lighting Act, 1927 (17 & 18 *Geo.* 5, *c.* 37), *s.* 1, *sub-s.* 1, *s.* 15.

The defendant owned a corner shop and an unpaved forecourt between the shop and the pavement of the public highway. The wall which had once surrounded the forecourt had at some time been removed and the public were in the habit of using the forecourt to reach the defendant's shop and that adjoining it. The defendant, having left his motor-car without lights on the forecourt during the hours of darkness, was charged with contravening s. 1 of the Road Transport Lighting Act, 1927. The magistrate, being of the opinion that the forecourt was not a "road" within the meaning of the Act, dismissed the information. On the prosecutor's appeal:—

Held, that the magistrate was entitled to find that the defendant's forecourt was a piece of private property which the public did not habitually use, and that it was not part of the public highway, and to dismiss the information accordingly.

Bugge v. *Taylor* [1941] 1 K. B. 198 only decided that there was in that case evidence on which the justices could find that the forecourt in question was a public highway: it did not lay down that a court was bound to find that a place was a public highway merely because it was not separated from the public highway by a wall or rail.

1951

THOMAS
v.
DANDO.

CASE STATED by the deputy stipendiary magistrate for the City of Cardiff.

An information was preferred against the defendant, David William Dando, charging him with unlawfully causing a motor car to which the Road Transport Lighting Act, 1927, applied to be on a road within the meaning of the Act during the hours of darkness, in contravention of s. 1 of that Act in that it did not carry two lamps each showing to the front a white light visible from a reasonable distance, and one lamp showing to the rear a red light similarly visible (1).

At the hearing of the information the following facts were proved or admitted:—On August 23, 1950, the defendant's motor car was found stationary outside his premises without any lights on during the hours of darkness. His premises consisted of a corner shop, with forecourt and garden attached, and an unpaved area in front of the garden at the side of the forecourt; and between the unpaved area and the road were the pavement and kerbstone. The unpaved area was the defendant's private property. The defendant had caused his car to be placed in the position in which it was found, and it was resting on the soil of the unpaved area and no part of it rested on either the pavement or the highway. At one time a wall surrounded the unpaved area but it had fallen down and been removed so that now no wall or fence separated the unpaved area from the pavement. Customers were in the habit of crossing the unpaved area and forecourt to enter the defendant's shop and the adjoining fish and chip shop.

It was contended on the part of the defendant that the place on which the car was found was not a "road" within the definition of the Act of 1947.

The magistrate, being of the opinion that the land on which the defendant had caused his car to be placed was not a road within the meaning of the Road Transport Lighting Act, 1927, dismissed the information.

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(1) Road Transport Lighting Act, 1927, s. 1, sub-s. 1: "Subject to the "provisions of this Act and of any "regulations made thereunder by the "Minister of Transport . . . every "vehicle on any road shall during the "hours of darkness carry—(*a*) two "lamps, each showing to the front a "white light visible from a reasonable distance; (*b*) one lamp showing "to the rear a red light visible from "a reasonable distance . . .".

Section 10: "If any person causes "or permits any vehicle to be on any "road in contravention of any of the "provisions of this Act . . . he shall "be guilty of an offence . . .".

Section 15: "For the purposes of "this Act, . . . the expression 'road' "means any public highway and any "other road to which the public has "access".

The prosecutor appealed.

J. C. Rutter for the prosecutor. The justices should have found that this forecourt was a "road" within s. 1, sub-s. 1, of the Road Transport Lighting Act, 1927. The principle appears from the decision of *Bugge* v. *Taylor* (2), which covers this case, especially in Lord Caldecote, C.J.'s citation (2) of a passage in *Harrison* v. *Hill* (3).

[LORD GODDARD, C.J. *Bugge* v. *Taylor* (2) established no principle and was merely a decision on the particular facts of that case.]

Baerlein, for the defendant, was not called on.

LORD GODDARD, C.J., stated the facts and continued:—The question for the magistrate was whether or not this unpaved area was a road. He has held that it was not, and we are asked to reverse his decision because of *Bugge* v. *Taylor* (2), which, in my opinion, was a wholly different case. *Bugge* v. *Taylor* (2) concerned the forecourt of a hotel which was in no way separated from the road, and over which the public were in the habit of walking and even driving. In fact, the hotel proprietors allowed the place to be used as though it were part of the road. The position was made clear by Lord Caldecote, C.J.'s judgment, where, quoting from the judgment of the Lord Justice General (Lord Clyde) in *Harrison* v. *Hill* (3) in the Court of Session, he said (2): "'It is plain from the terms of the definition, that the "'class of road intended is wider than the class of public roads "'to which the public has access in virtue of a positive right "'belonging to the public, and flowing either from statute or "'from prescriptive user'".

All that the court decided in *Bugge* v. *Taylor* (2) was that there was evidence on which the justices could find that the forecourt was a road. It was not laid down that every court was bound to find that a place is a road merely because it is not separated by a wall or rail from the pavement. It would be impossible to hold that this little piece of land, which was only used by the customers of the shop, is a road. The magistrate heard the evidence and came to the conclusion that this was a piece of private property which the public did not habitually use

(2) [1941] 1 K. B. 198, 200.

(3) 1932 S. C. (J.) 13, 16.

as they used the forecourt in *Bugge* v. *Taylor* (2). Therefore I think that he was entitled to find that it was not a public highway.

OLIVER, J. I agree.

CASSELS, J. I agree.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co., for S. Tapper Jones, Cardiff; Amery-Parkes & Co.*

S. C.

REX *v.* JUDGE PUGH. *Ex parte* GRAHAM.

1951
June 14.

Lord Goddard, C.J., Lynskey and Devlin, JJ.

Landlord and Tenant—Rent restriction—Standard rent—Apportionment—Rent tribunal—Reduction of rent of two flats—Subsequent allegation by tenant that two flats previously let as one—Application to county court for apportionment—Landlord's reliance on tribunal's decision—Matter of defence—County court judge's refusal of jurisdiction—Validity—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 3—*Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1.

In September, 1950, the tenants of a house, comprising two flats let separately, referred their tenancies to the local rent tribunal. Proceeding on the basis that the flats had been first let since September 1, 1939, the tribunal reduced the rents. Subsequently one of the tenants, alleging that he had discovered that the house comprising the flats had been let as one maisonette before September 1, 1939, and that no structural alterations had been effected to the maisonette since that date, applied to the county court for apportionment of the rent at which he alleged the maisonette had been let as a whole. The landlord objected to the application for apportionment, contending that the rent tribunal had already determined the reasonable rent of each flat, which by s. 1, sub-s. 2, of the Landlord and Tenant (Rent Control) Act, 1949, had then become the standard rent of that flat, and that consequently the county court had no jurisdiction to ascertain the standard rent by apportionment. The tenant submitted that, as the house had been first let before September 1, 1939, and as the premises were still one dwelling-house for the purposes of the Rent

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[Reported by MISS E. DANGERFIELD, Barrister-at-Law.]

Restriction Acts, the tribunal had acted without jurisdiction and accordingly that their decision was a nullity.

The county court judge having declined jurisdiction, the tenant applied for an order of mandamus directing him to determine the application.

Held, that the landlord's objection that the rent tribunal's decision precluded the tenant from now applying for apportionment was a matter of defence and not one going to jurisdiction; for, where the decision of an inferior court was relied on by one party to proceedings as conclusive against the other, it must be shown by the party so relying that the inferior court had jurisdiction to give the decision relied on; that the county court judge should accordingly have proceeded with the hearing and tried the issue whether or not the two flats had been let before September 1, 1939; that, if he found that they had, and had been let as one dwelling-house, he would prima facie have to apportion the rent reserved by that contract of letting between them; and that an order of mandamus must therefore issue.

Per Devlin, J. The county court judge's view that for him to entertain the application for apportionment involved his invading the right of the Divisional Court to supervise the rent tribunal showed a misunderstanding of the nature of the powers which that court exercised by way of certiorari and mandamus. Those powers are not exclusive, but are used in order to give a speedy remedy against obvious errors of jurisdiction. It is clear on the authorities that when any question is raised as to the jurisdiction of an inferior court—a court having limited jurisdiction—the question must be tried by the court before which it is raised.

APPLICATION for an order of mandamus.

In September, 1950, the tenants of two adjoining flats, known as 20A and 20B Buckland Crescent, Hampstead, applied to the local rent tribunal claiming that the rents of the flats were excessive and ought to be reduced. The applications were made under the Landlord and Tenant (Rent Control) Act, 1949, on the footing that the flats were two dwelling-houses which were first let after September 1, 1939, and that accordingly, by virtue of s. 1 of the Act of 1949 (1), the tribunal had jurisdiction to determine the reasonable rent.

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(1) Landlord and Tenant (Rent Control) Act, 1949, s. 1, sub-s. 1: "Where apart from this section the "standard rent of a dwelling-house "would be—(*a*) the rent at which it "was let on a letting beginning after "the first day of September, nineteen "hundred and thirty-nine, . . . then ". . . the tenant may make applica-"tion to the Tribunal to determine "what rent is reasonable for that "dwelling-house".

Sub-s. 2: ". . . if the rent so deter-"mined by the Tribunal as aforesaid "is less than what would be the "standard rent apart from this sec-"tion, it shall, as from the date of "the determination thereof, be the "standard rent of the dwelling-"house".

At the hearing before the tribunal the applicant tenant mentioned that there had been a previous letting of the premises as a single dwelling-house, but he proceeded with his case on the footing that his flat was a separate dwelling-house first let after September 1, 1939, and the tribunal reduced his rent from 200*l.* to 125*l.* After that, the tenant Graham applied to the county court under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (2), for an apportionment of the rent at which the premises had been let as a whole—alleging that, for the purpose of the Rent Restriction Acts, the premises were still let as one dwelling-house, since no structural alterations had been made since the letting as a single dwelling-house.

The county court judge was informed of the earlier proceedings before the rent tribunal, and he refused to hear the application for apportionment on the ground that he could not act as a court of appeal from the tribunal or make an apportionment which might conflict with the standard rent resulting from the tribunal's decision.

The tenant now applied for an order of mandamus directing the county court judge to hear the application.

C. Lawson for the tenant. The county court judge should have heard the application for apportionment. The rent tribunal have jurisdiction under s. 1 of the Landlord and Tenant (Rent Control) Act, 1949, only to consider lettings which began after September 1, 1939, and if a tribunal make any determination relating to a letting beginning before that date, their decision is a nullity. If the standard rent arrived at by apportionment of the rent reserved by the earlier letting of the premises as one dwelling-house differs from the registered rent derived from the tribunal's decision, it may be necessary to apply to have the tribunal's decision set aside, but the setting aside of the tribunal's decision is not a pre-requisite to the hearing before the county court.

It is true that the tribunal were asked to act by both parties, but there is no estoppel under the Rent Restriction Acts.

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(2) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3: "Where for the purpose of "determining the standard rent or "rateable value of any dwelling-"house to which this Act applies, it is "necessary to apportion the rent at "the date in relation to which the "standard rent is to be fixed . . . the "county court may, on application . . . "make such apportionment as seems "just . . .".

Further, the parties cannot by their action confer jurisdiction on the tribunal where none exists under the Landlord and Tenant (Rent Control) Act, 1949. [Counsel referred to *J. & F. Stone Lighting and Radio Ld.* v. *Levitt* (3) and *Lazarus-Barlow* v. *Regent Estates Co. Ld.* (4).] There was no need for the county court judge to consider the decision of the tribunal, for it could not arise on an application to apportion rent; and by s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the judge was required to make an apportionment on an application being made to him. [He referred to *Rex* v. *Marylebone County Court Judge* (5).]

It is clear from *Rex* v. *Fulham, etc., Rent Tribunal; Ex parte Zerek* (6) that where a tribunal decide that they have jurisdiction to proceed and they make a determination on that footing, if their view is shown subsequently to have been wrong, the determination is without effect.

Finlay for the landlord. The premises have never been let as a single dwelling-house. The arrangement which existed before September 1, 1939, between the landlord and his son was not a letting for the purposes of the Rent Restriction Acts. Further, neither the tenant nor the tribunal were unaware of the existence of that previous arrangement. The tribunal have made a decision on the basis that the premises comprised two dwelling-houses let separately and the standard rent of those dwelling-houses having been ascertained, it is not open to the county court judge to make an apportionment of the rent reserved by a previous letting.

Section 1, sub-s. 2, of the Landlord and Tenant (Rent Control) Act, 1949, only applies if there has not been a letting of the premises before September 1, 1939, so that, apart from the provisions of the Act of 1949, the rent on September 1, 1939, would normally be the standard rent of those premises. If the rent tribunal proceed on the basis that they have jurisdiction under the Act of 1949, they imply that the rent referred to them is the standard rent of the premises on September 1, 1939. If they are right in that assumption, the reasonable rent which is registered, if less than the rent referred to them, becomes the standard rent and, until that finding is set aside by a court of competent jurisdiction, the rent as determined by the tribunal stands. Therefore if the county court judge had apportioned the rent of the whole house, there might have been two different standard rents for the flats. The county court judge would have had no jurisdiction to decide which of those rents was right, nor to decide whether the tribunal had had jurisdiction to consider the two tenancies which were referred to them, nor by his decision could he make the tribunal's determination a nullity. [He referred to *Baldwin* v. *Gurnsey* (7).]

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(3) [1947] A. C. 209, 215.

(4) [1949] 2 K. B. 465.

(5) [1923] 1 K. B. 365.

(6) Ante, 1.

Rex v. *Fulham, etc., Rent Tribunal; Ex parte Zerek* (8) was concerned with the powers of the Divisional Court to impugn the decision of the tribunal, but here it was not a question of a superior court and that case is not in point.

As there was already a standard rent, there was no need to apply for an apportionment of the rent of the whole house under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

LORD GODDARD, C.J. The circumstances here are certainly very unusual. I have considerable sympathy with the county court judge who had to decide this point, and with the landlord; but we have to see what the rights of the parties are. The facts which led to the application are these:—In September, 1950, there were two separate tenants of flats known as 20A and 20B Buckland Crescent, Hampstead. Those two tenants referred their tenancies to the local rent tribunal, claiming that the rents were excessive and ought to be reduced. The references were under the Landlord and Tenant (Rent Control) Act, 1949, under which, to put it compendiously, the rent tribunals have jurisdiction, if the standard rent of the premises is the rent at which the premises were let on a letting beginning after September 1, 1939, to reduce that standard rent. Unless the standard rent was fixed in that way—that is to say, by reason of the premises being first let after September 1, 1939—the rent tribunal cannot proceed under the Act of 1949; they have no jurisdiction to do so; they have only jurisdiction to entertain cases in which the standard rent is fixed in that way.

The case was put to the tribunal by the present applicant, and by the tenant of the other flat, on the footing that these flats were two separate dwelling-houses, and that they were first let after September 1, 1939. If those were the facts, the tribunal had jurisdiction, and they reduced the rent of his flat from 200*l*. to 125*l*., which one would have thought would have satisfied most tenants, but it did not satisfy this one, the present applicant; he

(7) [1949] 1 K. B. 102, 106.

(8) Ante, 1.

seems to have known, or to have believed at the time when he went before the tribunal, that there had previously been a letting of these two flats as one maisonette. Having mentioned that before the tribunal, he proceeded to conduct his case on the footing that there were two lettings, two different flats, and obtained the decision of the tribunal on the ground that that was the state of affairs which existed.

Since the tribunal have given their decision, he thinks that he has discovered facts—whether he is right or wrong will have to be determined hereafter—which show that before September 1, 1939, those two sets of premises which are now called two separate flats were let as one. It is alleged that nothing has been done to alter those premises structurally, so that for the purpose of the Rent Restriction Acts they are still one dwelling-house, in which case he is entitled to apply to the county court for apportionment, which is what he did, in the hope, of course, that he was going to get his rent still further reduced.

When the case came before the county court judge, he was informed of the proceedings before the rent tribunal, and accordingly refused to hear the case, taking the view that he was being asked to act as a court of appeal from the rent tribunal, or to hold that the rent tribunal had had no jurisdiction; and he also pointed out that, if he gave a decision apportioning the rent, there would apparently be two standard rents, the first depending on his decision and the second on the tribunal's decision. He accordingly declined jurisdiction. In my opinion, the county court judge was wrong. I think that the fundamental error here is that matters were treated as going to jurisdiction which were really matters of defence. When the case comes to be heard it will, of course, be open to the landlord to establish, if he can, that there never was one dwelling-house, that there were always two dwelling-houses, and that there is, therefore, nothing to apportion. The county court judge will then have to decide whether before September 1, 1939, or before the letting in question, there were two dwelling-houses or only one. If there was only one, prima facie he will have to make an apportionment. If the objection is that the matter has already been adjudicated on by the Hampstead Rent Tribunal, it will, as seems to be clear law now, have to be determined by the judge whether the tribunal had jurisdiction, for a rent tribunal can only give a valid decision on a reference if they have jurisdiction to entertain it.

The parties cannot, by their own action, give a tribunal jurisdiction; and, as Willes, J., said in his speech advising the House of Lords in the well-known case of *London Corporation* v. *Cox* (9): "If the decision were in favour of the plaintiff it is "still not conclusive, because 'the rule, that in inferior "'courts and proceedings by magistrates the maxim omnia "'præsumuntur rite esse acta does not apply to give jurisdic- "'tion, never has been questioned'". Therefore, it seems to be clear that where the decision of an inferior court is relied on by one party to proceedings as conclusive against the other, it must be shown by the person who relies on that decision that the court giving it had jurisdiction.

My Brother Devlin in *Rex* v. *Fulham, etc., Rent Tribunal; Ex parte Zerek* (10), recently considered *Briscoe* v. *Stephens* (11). Consideration of the judgment in that case shows clearly enough that if the decision of an inferior court is pleaded as estopping a plaintiff from proceeding, the defendant must first adduce by his plea facts which will show that the inferior tribunal had jurisdiction, and the plaintiff can reply that there was no jurisdiction. Then, of course, the case has to be fought out. Therefore it seems to me that, so far as the decision of the rent tribunal is material to this case, it was incumbent on the county court judge to try that matter; for if it turns out that these two flats really were one dwelling-house which had been let before September 1, 1939, the tribunal, although acting in all good faith and because asked to do so by both parties, in fact had no jurisdiction. If they had no jurisdiction then its decision, in the words of Best, C.J., in *Briscoe* v. *Stephens* (12), must be regarded as "coram non judice et tout oustrement void"—void to all intents and purposes. Of course, if it is void to all intents and purposes it has no effect whatever.

In my opinion, therefore, the county court judge was bound to hear this application for apportionment. The defendant landlord may raise the defence that there is nothing to apportion because these two flats were never one, and there was never one dwelling-house. If he fails on that, then I think he will be in considerable difficulty if it is shown that the complete dwelling-house was let before September 1, 1939, for in that event the tribunal would have had no jurisdiction, as they can entertain only cases where the first letting began after September 1, 1939.

I am therefore of the opinion that there must be an order of mandamus.

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(9) (1867) L. R. 2 H. L. 239, 262.

(10) Ante, 1.

(11) (1824) 2 Bing. 213.

(12) 2 Bing. 213, 219.

LYNSKEY, J. I agree. I think that the course taken on behalf of the defendant landlord before the learned county court judge was wrong: he objected to the jurisdiction, but this was not a matter going to jurisdiction. If there had been, as there may have been, a valid decision of the rent tribunal fixing the reasonable rent at a figure lower than what had been thought to be the standard rent so that by virtue of s. 1, sub-s. 2, the rent so determined by the tribunal became the standard rent, that was a matter of defence, not a matter going to jurisdiction. If that defence had been pleaded, the learned county court judge would have had to investigate it, and one of the questions which he would have had to determine is whether there had been a letting of the two flats as one dwelling before September 1, 1939, and, if he decided that there had, he would have had to apportion. If he had been satisfied that there had not been a letting of the premises before September 1, 1939, the standard rent would have been ascertained by the tribunal's determination, and he would not have been called upon to apportion it because there would have been nothing to apportion.

In those circumstances, the county court judge ought to have entertained the tenant's application for apportionment and there must be an order of mandamus so directing him.

DEVLIN, J. I agree, and I desire to add only a word in relation to one particular reason which was given by the county court judge for not hearing the matter. He said: "Nor could "I listen to any argument that the above conditions had not "been fulfilled, and that the tribunal had acted without juris- "diction, for that would be to arrogate to myself the preroga- "tive rights of the Divisional Court to supervise inferior "tribunals". I think, if I may say so with respect, that that shows a misunderstanding of the nature of the powers which the court exercises by way of certiorari and mandamus. They are not in any sense exclusive powers; they are powers which the court exercises in order to give a speedy remedy against obvious errors of jurisdiction. The authorities to which my Lord has referred make it clear that when any question is raised as to the jurisdiction of an inferior court—that is, a court with limited jurisdiction—that question must be tried by the court before which it is raised.

I agree that the defendant landlord's point goes not to jurisdiction but to defence.

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REX *v.* JUDGE PUGH. *Ex parte* GRAHAM.

C. Lawson, for the tenant, asked for the costs of the application for mandamus, stating that the county court judge had ordered the costs of the county court proceedings to be the landlord's, which costs had been paid by the tenant. Counsel asked not that that order should be set aside, but that the costs paid by the tenant below should be treated as part of the costs of and occasioned by the present application.

LORD GODDARD, C.J. [on the question of costs]. We are in effect, setting aside the decision of the county court judge, who ordered the tenant to pay the costs below. We are saying that that was wrong, and so we shall order that the costs which the judge ordered the tenant to pay should be repaid; but we do not see fit to give any costs of this application. The tenant will have his order for mandamus without costs.

He or his advisers knew something about this matter before they went before the rent tribunal and insisted on getting a reduction of the rent. If the tenant had obtained a greater reduction from the tribunal, he would not have gone on with the matter in the county court. We are not going to give him the costs of his application, but he will get back the costs which he has paid to the landlord.

Order accordingly.

Solicitors: *Richard Davies & Son; Crawley & de Reya.*

SLATCHER *v.* GEORGE MENCE SMITH LD.

1951 *June* 14, 15, 28.

Lord Goddard, C.J., Lynskey and Devlin, JJ.

Merchandise marks—Applying false trade description to goods—Sale of paraffin—False description of quantity sold stated in receipt—Receipt made out by defendants' manager—All reasonable precautions taken by the defendants against the commission of the offence—Defendants not acting "innocently"—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-s.* 2.

An inspector of weights and measures entered a shop of the defendants with an empty can and asked the manager for two gallons of paraffin. The manager took the can away and brought it back containing paraffin. At the inspector's request the manager wrote out and gave to him a receipt stating "2 gall. Oil 3*s.* 0*d*". The can in fact contained less than two gallons of paraffin.

The defendants in answer to an information charging them with

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having sold paraffin to which a false description as to quantity was then applied contrary to s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, contended that they were not liable for the act of their manager because they had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by their manager of offences against the Act, and this contention was upheld by the justices, who accordingly dismissed the information. On appeal:—

Held, allowing the appeal, that exceptions (*a*) and (*b*) to s. 2, sub-s. 2, applied only to cases where the goods in question were sold with the false trade description already applied to them and not to cases where it was applied on the occasion of the sale, and exception (*c*) applied only where the defendant had acted inadvertently or under some mistake of fact, and the fact that a defendant had acted in good faith and had taken all precautions against committing an offence against the Act would not amount to proof that otherwise he had acted innocently within the meaning of exception (*c*).

Dictum in *Coppen* v. *Moore* (*No. 2*) [1898] 2 Q. B. 306, 314, 315, disapproved.

CASE STATED by Kent justices.

Two informations were preferred against George Mence Smith Ld., each charging them with having, on December 8, 1950, at Ashford, Kent, sold certain goods, namely, paraffin, to which a certain false trade description was then applied contrary to s. 2 of the Merchandise Marks Act, 1887 (1).

The following facts were proved or admitted before the justices:—The defendants carry on business at more than a hundred branches, one of which is at a shop in Ashford. On December 5, 1950, an inspector of weights and measures entered that shop carrying an empty one-gallon can and asked the manager for a gallon of paraffin. The manager took the can away and brought it back containing paraffin. At the inspector's request the manager wrote out and gave to him a receipt. This receipt read " Oil 1*s.* 9*d.*". The inspector remained in the shop. A second inspector of weights and measures then entered the shop carrying an empty five-gallon can and asked the manager for two gallons of paraffin. The manager took the can away and brought it back containing paraffin. At the second inspector's request the manager wrote out and gave him a receipt. That receipt read "2 Gall. Oil. 3*s*. 0*d*.". The prosecutor (another inspector of weights and measures) then entered the shop and in the presence of the manager the paraffin in each of the cans was measured. The quantity in the one-gallon can was seventeen fluid ounces (nearly a pint) short of a gallon, and the quantity in the five-gallon can was twenty-nine fluid ounces (nearly a pint and a half) short of two gallons.

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(1) Merchandise Marks Act, 1887, s. 2, sub-s. 2: " Every person who " sells . . . any goods . . . to which " any . . . false trade description is " applied . . . shall, unless he proves " (*a*) that having taken all reasonable precautions against committing an offence against this Act, " he had at the time of the commission of the alleged offence no " reason to suspect the genuineness " of the . . . trade description; and " (*b*) that on demand made by or on " behalf of the prosecutor, he gave all " the information in his power with " respect to the persons from whom " he obtained such goods . . . ; or " (*c*) that otherwise he had acted " innocently; be guilty of an offence " against this Act ".

It was further found that the defendants supplied their manager with suitable measures and funnels for the purpose of measuring oil and filling customers' receptacles; that representatives of the defendants visited the premises once a week or once a fortnight for the purposes of inspection; and that the manager had been in the defendants' employ for thirty-five years and had been instructed as to the proper use of measures.

The false descriptions alleged in the informations were as to the quantity or measure of paraffin sold in the case of each of the two sales.

The two informations were by consent heard together by Kent justices sitting at Ashford on January 4, 1951.

It was contended on behalf of the defendants (1.) that the proceedings were wrongly conceived and could not be sustained under the Merchandise Marks Act, 1887; (2.) that a false trade description for the purpose of s. 2 of that Act must be in writing; (3.) that in the case of the sale to the first inspector the receipt contained no false trade description because the quantity was not shown, and the only false trade description which was alleged was as to quantity; (4.) that the defendants were not liable criminally for the actions of their servants if the defendants had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by their agents of offences against the Act, and that the defendants had proved that they had so acted; and (5.) that the defendants had proved either (*a*) and (*b*) or (*c*) of s. 2, sub-s. 2, of the Act.

It was contended on behalf of the prosecutor (1.) that the proceedings were properly brought under the Act; (2.) that neither the defence in exceptions (*a*) and (*b*) nor that in (*c*) of s. 2, sub-s. 2, was applicable; and (3) that the defendants had not in fact proved either of those defences.

The justices found that in both cases paraffin had been sold under receipts to which a false trade description had been applied, and were of opinion that the proceedings were properly brought under the Act of 1887, but they found that the statutory defence set up by the defendants under s. 2, sub-s. 2, of that Act had been proved. Accordingly they dismissed both informations.

The prosecutor appealed.

Vernon Gattie for the prosecutor. The statements of quantity relied on as containing the false trade description were those contained in the receipts; the first receipt stated only "Oil 1*s*. 9*d*." and contained no statement of quantity, and the appeal is therefore not pursued in the case of the first information. The second receipt read "2 Gall. Oil 3*s*. 0*d*." and contained a false trade description as to quantity. The defendants failed to set up a statutory defence under s. 2, sub-s. 2, of the Merchandise Marks Act, 1887. Exceptions (*a*) and (*b*) are quite inapplicable to the present case. Assuming that the justices found that the defendants acted innocently, that is insufficient to establish a defence under exception (*c*), because their servant did not act innocently. [Counsel referred to *Coppen* v. *Moore* (*No. 2*) (2); *Stone* v. *Burn* (3); *Mercer* v. *Pyramid Sand and Gravel Co.* (4); and *Kat* v. *Diment* (5).] Here there was no inadvertence or mistake of fact.

Arthian Davies, K.C., and *Malcolm Morris* for the defendants. The defendants rely on exception (*c*) of s. 2, sub-s. 2, of the Act. In *Coppen* v. *Moore* (*No. 2*) (2) a very strong court considered the very point now in issue and held that it was a defence under exception (*c*) to prove that the defendant had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act. That is in effect what the justices found in the present case. In that case the conviction was affirmed because the defendant had not taken reasonable precautions. In no material case but one, *Thompson* v. *Howard* (6), was there a finding of fact in favour of the defendant that he had taken reasonable precautions, and in that case the acquittal was affirmed by the Divisional Court. [Counsel referred to *Christie, Manson & Woods* v. *Cooper* (7); *Stone* v. *Burn* (8); *Allard* v. *Selfridge & Co. Ld.* (9); and *Mercer* v. *Pyramid Sand and Gravel Co.* (10).]

(2) [1898] 2 Q. B. 306.
(3) [1911] 1 K. B. 927.
(4) (1944) 109 J. P. 54.
(5) [1951] 1 K. B. 34.
(6) (1944) 108 J. P. N. 246.
(7) [1900] 2 Q. B. 522.
(8) [1911] 1 K. B. 927.
(9) [1925] 1 K. B. 129.
(10) 109 J. P. 54.

"He" in exception (*c*) means the person charged. Exception (*c*) cannot be read "that otherwise he or any person acting on his "behalf had acted innocently". "He" means the seller.

[LORD GODDARD, C.J. In the present case did not the manager of the shop sell the paraffin?]

No. The defendants sold it.

[LORD GODDARD, C.J. Cannot the manager, then, be prosecuted?]

He could be prosecuted under s. 2, sub-s. 1 (*d*).

The effect of *Coppen* v. *Moore* (11) is that "innocently" in exception (*c*) means without mens rea: see *per* Channell, J., in *Hobbs* v. *Winchester Corporation* (12). The effect is that the master is liable under s. 2, sub-s. 2, for his servant's act unless he can prove, as in the present case, that he himself is not in default: see Halsbury, Laws of England (2nd ed.), vol. 22, p. 233.

[LORD GODDARD, C.J., referred to *Allen* v. *Whitehead* (13).]

The Act of 1887 was not intended to make the master absolutely liable for the acts of his servant; where under similar Acts the master is made absolutely liable a special escape provision such as s. 83 of the Food and Drugs Act, 1938, is included.

Gattie replied.

Cur. adv. vult.

June 28. LORD GODDARD, C.J., reading the judgment of the court (which, he said, had been prepared by Lynskey, J.) stated the facts and continued:—The first information related to the sale of one gallon of paraffin to an inspector. The statement relied upon as constituting the false trade description was that contained in the receipt given to him. This receipt, however, which read "Oil 1*s*. 9*d*.", contained no statement as to the measure or quantity of the oil sold, and the prosecutor did not pursue the appeal in the case of this information.

The second information related to the sale of two gallons of paraffin to another inspector. The statement relied on as constituting the false trade description was that contained in the receipt given to him, which read "2 Gall. Oil 3*s*. 0*d*.". As the paraffin sold was twenty-nine fluid ounces (nearly a pint and a half) short of two gallons, this was a false trade description applied to the goods sold, and the defendants did not seek to challenge the justices' finding to this effect in relation to this information.

(11) [1898] 2 Q. B. 306.
(12) [1910] 2 K. B. 46, 55.
(13) [1930] 1 K. B. 211.

The question that we have to decide is whether, on the facts found by the justices, it was open to them to hold that the statutory defence set up by the defendants under s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, had been established.

The justices find generally that the defence in s. 2, sub-s. 2, has been established without specifying whether that defence was under exceptions (*a*) and (*b*) or under the alternative exception (*c*). It seems clear that the defence provided under exceptions (*a*) and (*b*) was not open to the defendants on the facts of this case. Exceptions (*a*) and (*b*) apply to cases where the goods in question are sold with the forged trade mark or false trade description already stamped upon them or otherwise applied to them, and not to a case like the present where the false trade description is applied upon the occasion and as part of the terms of sale. In the latter case the defendant must rely for his exculpation upon exception (*c*), namely, by showing " that otherwise he had acted " innocently ".

The defendants' contention before the justices was that if they had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by their agents of offences against the Act, they were entitled to be acquitted. The justices appear to have accepted this contention as good in law and dismissed the information on the ground that the defendants had established that they had " otherwise acted innocently ". We have to consider what is the true construction of these words in their context.

In *Coppen* v. *Moore (No. 2)* (14) a Divisional Court of six judges, including Sir F. H. Jeune, P., and Chitty, L.J., had to consider the question whether the Act made a master criminally liable for acts done by his servants in contravention of s. 2, sub-s. 2, when acting in the general scope of their employment although contrary to their master's orders. The judgment of the court was delivered by Lord Russell of Killowen, C.J., who, in the course of it, said (15): " In our judgment it was clearly the " intention of the legislature to make the master criminally liable " for such acts, unless he was able to rebut the prima facie pre- " sumption of guilt by one or other of the methods pointed out " in the Act ". Having dealt with the question before the court, Lord Russell went on to add by way of obiter (16): " The master " or principal may be relieved from criminal responsibility where

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(14) [1898] 2 Q. B. 306.
(15) Ibid. 313.
(16) Ibid. 314, 315.

" he can prove that he had acted in good faith and had done all " that it was reasonably possible to do to prevent the commission " by his agents and servants of offences against the Act ". This interpretation of the words " otherwise he had acted innocently " does not seem to have been followed in any of the later reported decisions of this court. We must pay the greatest respect to the obiter of such a strongly constituted court, but the particular question was not before that court for decision, and it is difficult to believe that, if it had been, the court would have come to this conclusion. Section 2, sub-s. 2, of the Act provides two alternative defences, the first under exceptions (*a*) and (*b*) and an alternative defence under (*c*). To establish his defence under (*a*) and (*b*) the defendant must prove (1.) that he had taken all reasonable precautions against committing an offence under the Act, (2.) that at the time of the commission of the alleged offence he had no reason to suspect the genuineness of the trade description, and (3.) that on demand he gave all information within his power with respect to the person from whom he obtained the goods. If he fails to establish any one of these things his defence fails.

If the alternative defence in exception (*c*) is interpreted as meaning that he acted bona fide, and had taken all reasonable precautions against committing an offence, then, although his defence might fail under (*a*) and (*b*), he could still avail himself of the defence of (*c*). Such an interpretation is to ignore the presence of the word " otherwise " in exception (*c*). Looked at from the other point of view, if exception (*c*) is construed as suggested, exceptions (*a*) and (*b*) are surplusage and unnecessary, as any person who could satisfy the requirements of (*a*) and (*b*) must have been acting bona fide and taking all reasonable precautions against committing an offence under the Act.

In our view, the words in their context cannot be construed as having the meaning conceived in *Coppen* v. *Moore* (17).

Section 2, sub-s. 2, of the Act again came before this court in *Stone* v. *Burn* (18). In the course of his judgment Lord Alverstone, C.J., said (19): " Then arises the question whether the " conviction can be quashed on the ground that the appellant " proved that he had acted innocently. I cannot say that the " justices ought as a matter of law to have held that the appellant " had acted innocently and therefore had committed no offence.

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(17) [1898] 2 Q. B. 306.

(18) [1911] 1 K. B. 927.

(19) Ibid. 931.

" Mere ignorance of the provisions of the statute does not amount " to innocence for this purpose. The words ' acted innocently ' " point to some misapprehension of fact. And here the appellant " did not labour under any mistake of fact, for he did what he " did with full knowledge, and claiming that he had a right to " do it ". Lord Coleridge, J., in the same case, said (20): " The " only defence could be that he was acting innocently. But, as " was said by Channell, J., in *Christie, Manson & Woods* v. " *Cooper* (21), ' the innocence contemplated by the Act is " ' innocence of any intention to infringe the Act of Parliament '. " Such innocence can only exist where the infraction was committed by inadvertence or mistake of fact ". The effect of the decision in *Stone* v. *Burn* (20) is that the words " that otherwise " he had acted innocently " mean that he had acted by inadvertence or under misapprehension or mistake of fact.

In *Allard* v. *Selfridge & Co. Ld.* (22) the passage set out above from the judgment of Lord Coleridge, J., is quoted with approval by Lord Hewart, C.J. (23), and by Shearman, J. (24).

In *Mercer* v. *Pyramid Sand and Gravel Co.* (25) Viscount Caldecote, C.J., said: " The defence raised was that ' otherwise ' " they had acted innocently, which means, in my opinion, that " they had acted in some way, as Lord Coleridge, J., said in " *Stone* v. *Burn* (26), by inadvertence or mistake of fact. The " respondents have done no more than satisfy the justices, whose " finding of fact binds us, that they had acted innocently in the " sense that they had no intention to infringe the statute, but " that, according to the decision of the court in *Allard* v. " *Selfridge & Co. Ld.* (22), is not the meaning of the words ". In the same case (27) Birkett, J., quotes the passage from the judgment of Lord Coleridge, J., in *Stone* v. *Burn* (26) again with approval.

The section was last considered in this court in *Kat* v. *Diment* (28). Lord Goddard, C.J., cited (29) the passages both from the judgments of Lord Alverstone, C.J., and Lord Coleridge in *Stone* v. *Burn* with approval (30).

In this state of the authorities it seems to us that we must construe the words " that otherwise he had acted innocently " as meaning that he had acted inadvertently or under some mistake of fact. The fact that he had acted in good faith and had taken all precautions against committing an offence against the Act will not amount to proof that the defendant had otherwise acted innocently. This is all that the justices have found proved in this case. There is no finding of inadvertence or mistake. The case must go back to them with a direction that the statutory defence set up before them by the defendants has not been proved and that they should convict the defendants.

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(20) [1911] 1 K. B. 927, 933.
(21) [1900] 2 Q. B. 522.
(22) [1925] 1 K. B. 129.
(23) Ibid. 135.
(24) Ibid. 139.
(25) 109 J. P. 54. 56
(26) [1911] 1 K. B. 927, 933.
(27) 109 J. P. 54, 57.
(28) [1951] 1 K. B. 34.
(29) Ibid. 41.
(30) [1911] 1 K. B. 927, 931, 933.

We have considerable sympathy with the lay justices who have to administer the Merchandise Marks Act, 1887. It is a most difficult Act to construe and has given rise to many appeals. Those who are responsible might well consider whether new legislation should not be introduced to set out the law on this matter in clear language which lay justices and others concerned with its administration could understand.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for W. L. Platts, Maidstone; Lovell, White & King for Swann & Co., Ashford, Kent.*

R. P. C.

BEST *v.* SAMUEL FOX & CO. LD.; J. W. THOMPSON (TRADING AS STEEL CONSTRUCTION CO.) THIRD PARTY.

[1949 B. No. 171]

C. A.

1951
Jan. 24, 25, 26;
May 10.

Lord Asquith of Bishopstone, Cohen and Birkett, L.JJ.

Negligence—Personal injuries—Injury to husband resulting in sexual impotence—Claim by wife against defendants for interference with consortium.

The plaintiff's husband was injured by the negligence of the defendants. As the result of his injury, though he retained the sexual urge, he was unable to perform the sexual act. The husband sued the defendants, alleging breaches of statutory duty and negligence, and recovered damages. About six months later his wife sued the defendants alleging that by their injury to her husband they had deprived her of his consortium. This claim was amended to one that the defendants had interfered with her consortium, since husband and wife had continued to live together under the same roof. At the time of the husband's injury, the

Affirmed. [1952] A.C. 716

defendants had no knowledge of the existence of the plaintiff. The wife proved that, as a result of her husband's sexual impotence, her health was impaired and this was not contested by the defendants.

Held, that, assuming that the wife had a cause of action against the defendants, it was only for the total, even though temporary, loss of her husband's consortium. Consortium was one and indiscerptible: the strands of the consortial bond were; companionship, love, affection, comfort, mutual service, sexual intercourse—all belonged to the married state: taken together they made up the consortium; but no action lay for loss of a portion of the consortium. Here there was serious impairment of the consortium, involving the loss of children and a full family life; but the loss of consortium was not complete, since husband and wife were still living together, under the same roof.

Per Lord Asquith of Bishopstone (on the issue of the wife's cause of action for loss of her husband's consortium): Until, at all events, some thirty years ago, mediæval notions persisted, according to which the rights of a husband against a wife were different from those of a wife against a husband. Her consortium and servitium were the property of the husband, any encroachment on which conferred on him a cause of action in the nature of trespass. The enticement actions were in case, and the enticement was a conscious and intentional invasion of the consortium. But, in this different connexion, two out of the three judges in *Place* v. *Searle*, [1932] 2 K. B. 497, stated that the wife had the same right to the husband's consortium as he had in hers. In the case of a husband's action for loss of consortium due to the wrongful act of the defendant, knowledge and intention were, as in trespass generally, irrelevant and the statements of the two judges in *Place* v. *Searle*, supra, appeared to amount to no more than dicta. Ninety-nine per cent. of the decisions in the United States of America, as well as the Restatement of the Law of Torts, negatived any such right in the wife as was claimed here. If the husband's own right had first come in question as res integra today, it would probably have been negatived. The husband's right being deeply entrenched by authority and the wife's never having been affirmed, the intervention of the legislature would be needed to produce equality, either by abolishing the husband's cause of action or by retaining it and conferring a similar cause of action on the wife. The wife today had no such cause of action.

Per Cohen, L.J.: It was a matter of some doubt whether even proof of total loss of consortium would enable a wife to succeed, where that loss was due to a negligent, as distinct from a malicious, act of the defendants. The husband's right to recover for the loss of his wife's consortium in similar circumstances was an anomaly. It would appear that, in every case where the right was recognized, the action was for loss of consortium et servitium, so that the ratio decidendi might have been that, the husband being entitled to the services of his wife, she was in a certain sense to be regarded as his property. To recognize a right of action in a wife corresponding to that which the courts had recognized as vested in a husband, would be to extend a line of decision in itself anomalous.

Per Birkett, L.J.: The law in the enticement cases which had given a wife the right to sue when a malicious act had resulted in the loss of her consortium must apply when the act was negligent as distinct from intentional. The exclusion of the wife from this remedy could only be based on what must be regarded as an obsolete view of the husband's proprietary interest, and the character of the legislation passed in the last seventy years had made a decisive change. The rights of husband and wife in the corsortium were today fully mutual and equal before the law and the wife was entitled to bring an action against one who by his negligence has so injured her husband as to deprive her totally of her husband's consortium.

Decision of Croom-Johnson, J., affirmed, on the ground that the plaintiff had failed to show a total loss of her consortium.

APPEAL from a judgment of Croom-Johnson, J., delivered at Leeds Assizes.

On March 23, 1946, the plaintiff's husband, Rex Holroyd Best, a steel erector, 30 years of age, was working for the third party, J. W. Thompson, trading as the Steel Construction Co., and he was carrying out work at the premises of the defendants, Samuel Fox & Co. Ld., at Stocksbridge, when he was injured by the negligence of the defendants. As a result of his injuries he was afflicted with a form of sexual impotence. He retained the sexual urge, but was unable to perform the sexual act. He sued the defendants alleging breaches of statutory duty and negligence and recovered 4,238*l*. 15*s*. 0*d*., damages.

On January 12, 1949, his wife, Mrs. Julia Best, issued a writ against the defendants. By her statement of claim she first sued the defendants for depriving her of the consortium of her husband; but this was amended to a claim that her consortium had been interfered with by the defendants. She alleged that by reason of the sexual impotence of her husband, she suffered and continued to suffer from headaches, irritability, depression and a moderately intense anxiety neurosis. Those ill-effects on the health of the plaintiff were not disputed by the defendants.

Croom-Johnson, J., dismissed the action on the ground that the plaintiff had neither alleged nor proved a cause of action, though he expressed the view that, had there been a cause of action, the plaintiff would have been entitled to succeed whether she could have shown a total loss of consortium, or merely impairment of it.

The plaintiff appealed. Nothing arose on the appeal with regard to the third-party proceedings.

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Pritt, K.C. and *G. N. Black* for the plaintiff. In Salmond on the Law of Torts (10th ed.), s. 97 (1.), at p. 366, Mr. W. T. S. Stallybrass wrote: "It is a tort actionable at the suit of a "husband to take away, imprison, or do physical harm to his "wife, if (a) the act is wrongful as against the wife, and (b) the "husband is thereby deprived of her society or services. A "husband has a right as against third persons to the consortium "et servitium of his wife just as a master has a similar right to "the servitium of his servant. Any tortious act, therefore, committed against the wife is actionable at the suit of her husband "if he can prove that he was thereby deprived for any period "of her society or services (per quad consortium amisit or "servitium amisit)". Then there is a note to paragraph 1 "Bl. Comm. 111, 139; *Baker* v. *Bolton* (1); *Brockbank* v. "*Whitehaven Junction Railway Co.* (2)". Then by para. 5 of s. 97 Mr. Stallybrass states: "The rights of action of a married "woman in respect of injury done to her by depriving her of her "husband's society or services are similar. There is no precedent "for any action by a wife for the loss of the society or support of "her husband by reason of any wrongful act committed against "the husband—for example, false imprisonment. But there "seems no sufficient reason why, at the present day, such an "action should not lie". Then note (c) to this paragraph reads:—"Salmond thought otherwise (8th ed., p. 396), but the "passage cited by him from Blackstone (Comm. 111, 143) gives "reasons which are now obsolete".

In *Gray* v. *Gee* (3) it was held that a wife can maintain the action for enticement against anyone who persuades her husband to leave her. Darling, J., said in that case (4) that there was no distinction to be drawn here to the effect that the husband could bring the action because the wife was his property and that the wife could not because her husband was not her property. If a man was allowed to bring such an action, why should not a woman? See also *Newton* v. *Hardy* (5) where Swift, J., said (6): "The right to consortium was a mutual right of "husband and wife, and if anyone violated it either the husband "or wife could sue for damages for that wrong", and *Place* v. *Searle* (7). See also the proviso to s. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, which enacts that

(1) (1808) 1 Camp. 493.
(2) (1862) 7 H. & N. 834.
(3) (1923) 39 T. L. R. 429.
(4) Ibid. 431.
(5) (1933) 149 L. T. 165; 49 T. L. R. 522.
(6) Ibid. 166 and 524.
(7) [1932] 2 K. B. 497.

the sub-section shall not apply to a cause of action " for inducing " one spouse to leave or remain apart from the other ".

In Halsbury's Laws of England (2nd ed.) it is stated in Vol. 16, s. 959, at p. 612, under the title, " Husband and Wife ": " A wife has the same right to bring an action for damages " against a third person for enticing away her husband as a " husband has for enticing away his wife; and it would seem to " follow that a wife has a right of action in respect of any wrong- " ful act whereby she is deprived of the society and services of " her husband ". It is submitted that this opinion and the view expressed by Mr. Stallybrass are correct.

In Eversley on Domestic Relations (5th ed., 1937), at p. 156, the editor writes: " a wife who is deprived of the consortium of " her husband in consequence of slander by a third person may " also be entitled to maintain an action based on its loss ", and the authority cited is *Lynch* v. *Knight* (8). In Wharton's Law Lexicon (14th ed.) under the title " Consortium " is written at p. 139: " The marital right of cohabitation and mutual service. " An action for damages lies for loss of consortium or of the " services of the spouse, if that loss is caused by any wrongful " act such as enticement, slander, assault or negligence ". *Jackson* v. *Watson and Sons* (9) which is given as authority for that proposition may not be so, but the proposition states my contention before this court, exactly. Mr. Grant-Bailey, in the 4th edition of Lush on Husband and Wife, at pp. 54–56, appears not to favour my contention on the issue whether any act which is actionable per se or only on account of consequential damage has been committed against the wife, but he cites the speech of Lord Campbell, L.C., in *Lynch* v. *Knight* (10): " Nor can I " allow that the loss of consortium or conjugal society, can give " a cause of action to the husband alone ".

Passing to the authorities in *Place* v. *Searle* (11) the Court of Appeal following *Winsmore* v. *Greenbank* (12) held that anyone who, without justification, procures, entices or persuades a wife to violate her duty to reside and consort with her husband commits a wrong to the husband. A wife has a similar action against one who entices away her husband: *Gray* v. *Gee* (13). These two causes of action are well established. It is submitted that if the action subsists for enticement, it should also subsist

(8) (1861) 9 H. L. C. 577.
(9) [1909] 2 K. B. 193.
(10) 9 H. L. C. 577.
(11) [1932] 2 K. B. 497.
(12) (1745) Willes 577.
(13) 39 T. L. R. 429.

against one who by his negligence has reduced the husband to a physical wreck. Scrutton, L.J., in *Place* v. *Searle* (14), said: "It seems to be clear that at the present day a husband has the "right to the consortium of his wife, and the wife to the consortium of her husband, and that each has a cause of action "against a third party who, without justification, destroys that "consortium". See also the observations of Greer, L.J., in that case (15). Again in *Elliott* v. *Albert* (16) Scrutton, L.J., said: "The plaintiff proposes to prove that the defendant enticed her "husband away from her, whereby she was deprived of the "consortium to which she is entitled under the common law". From the declaration in *Brockbank* v. *Whitehaven Junction Railway Co.* (17) it appears that the husband claimed separately for the loss of the comfort and society of his wife by reason of her injury on the railway and also for the loss of her services. And it was held that the husband might sue apart from his wife for personal injuries done to her by trespass or negligence on the part of the defendants, in consequence of which he lost (a) her consortium and (b) her services.

The case on which this issue was debated in the House of Lords ninety years ago, that of *Lynch* v. *Knight* (18), does not decide it. The question raised was whether a wife could maintain an action against a third person for slander occasioning to her the loss of the consortium of the husband. Lord Campbell, L.C., said (19): "Nor can I allow that the loss of consortium or "conjugal society can give a cause of action to the husband "alone". He said that the loss of conjugal society might be "a "loss which the law may recognize to the wife as well as to the "husband. The wife is not the servant of the husband". Lord Cranworth also thought that a wife could have a cause of action for deprivation of her husband's society. But Lord Wensleydale thought that no action would lie. The decision was that the alleged ground of special damage did not show (in the conduct of the husband) a natural and reasonable consequence of the slander. The great balance of authority in the United States of America is against my contention, but, with this knowledge, in *Hittafer* v. *Argonne Co. Incorp.* (20), the United States Court of Appeals for the District of Columbia held in a case where her husband had been injured by the negligence of the defendants,

(14) [1932] 2 K. B. 497, 512.
(15) Ibid. 517.
(16) [1934] 1 K. B. 650, 662.
(17) 7 H. & N. 834.
(18) 9 H. L. C. 577.
(19) Ibid. 589.
(20) (1950) 183 Fed. R. 811.

that the wife had a cause of action for the deprivation of "his "aid, assistance and enjoyment, specifically sexual relations".

Blackstone in his Commentaries (5th ed.), Vol. 3, at p. 140, after relating that where there is a common assault on a man's wife or imprisonment the law gives the usual remedy to recover damages by action of trespass vi et armis which must be brought in the names of the husband and wife jointly, continues: "if the "beating or other maltreatment be very enormous, so that "thereby the husband is deprived for any time of the company "and assistance of his wife, the law then gives him a *separate* "remedy by an action of trespass, in nature of an action upon the "case, for this ill usage, per quod consortium amisit, in which "he shall recover a satisfaction in damages". In *Guy* v. *Livesey* (21) it was held that an action would lie at the suit of the husband for loss of consortium only for injuries done to the wife "per quod consortium uxoris suae for three days amisit". See also *Macfadzen* v. *Olivant* (22). In *Mallett* v. *Dunn* (23) it was held by Hilbery, J., that a husband who sues for damages caused to him by reason of injuries negligently inflicted on his wife sues in his own right and the fact that the wife was guilty of contributory negligence neither defeats his claim at common law nor causes any diminution of his damages under the Law Reform (Contributory Negligence) Act, 1945. In Bullen and Leake's Precedents of Pleadings (3rd ed.), at p. 340, is the count (after relating an assault on the plaintiff's wife): "And the plaintiff" (the husband) "A. B. also sues the defendant for (that the "defendant committed the trespass or trespasses, or grievance "or grievances) in the first count mentioned as therein alleged; "whereby the said A. B. lost the comfort and services of the "said C." (the wife) "for a long time, and will be permanently "deprived thereof". There is abundant authority that where by wrongful action of the defendant the plaintiff lost the consortium of his wife, an action lay against the defendant. Further the knowledge of the defendant that the wife was a wife was quite irrelevant: see *Brockbank* v. *The Whitehaven Junction Railway Co.* (24).

[*Paull, K.C.* I do not think I could contend to the contrary.]

The question raised here is whether a married woman has this same right, as has her husband. The whole tend of legislation since Lord Campbell, L.C., expressed his opinion in *Lynch*

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(21) (1618) Cro. Jac. 501.
(22) (1805) 6 East 387.
(23) [1949] 2 K. B. 180.
(24) 7 H. & N. 834.

v. *Knight* (25) has been to place the married woman on a par with her husband as regards her rights. As to the passage from Blackstone's Commentaries (5th ed.), vol. 3, ch. 8, at p. 142: "The wife cannot recover damages for beating her husband, for "she hath no separate interest in anything during her coverture", that state of things has long passed. Blackstone states that in these relative injuries (to husband, parent, guardian or master) notice is only taken of the wrong done to the superior of the parties related. A wife is no longer to be considered the inferior of her husband; the whole course of modern law postulates that this is not so. "The assistance of the wife in the conduct of the "household of the husband, and in the education of his children, "resembles the service of a hired domestic, tutor or governess" said Lord Wensleydale in *Lynch* v. *Knight* (26). That point of view is out of date. The wife is a partner in the household and shares in the mutual consortium and has the same rights against one who wrongfully interferes with it, as has her husband.

G. N. Black following. A husband's right of action for a wrongful action, "per quod consortium amisit", was distinct from that "per quod servitium amisit". Each was a right against all the world. In an action for assaulting the maidservant of the plaintiff and debauching her "per quod servitium amisit" it need not be shown that the defendant knew that the maidservant was in the plaintiff's service: see *Fores* v. *Wilson* (27). Lord Kenyon, distinguishing that case from the action for seducing a hired servant to leave her master's service where such knowledge was necessary, said: "No such knowledge is necessary to support "this action". So in an action by a wife for injury to the consortium of her husband it is not necessary to prove knowledge by the defendant that her husband was a married man: see also *Attorney-General* v. *Valle-Jones* (28). The right is to the mutual society, help and comfort that husband and wife should have from each other. The decision in *Lumley* v. *Gye* (29) is irrelevant in this case.

By the combined effect of the Married Women's Property Act, 1882, and the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman is now placed, with regard to the ownership and disposition of property, in the same position as a feme-sole or a man: see *Rees* v. *Hughes* (30). A married woman, therefore, has a separate right to the consortium of her husband as he has to hers. Their rights are separate, similar and mutual. Any impairment of such rights by a wrongful act affords the wife a cause of action. See also the declaration (second count) in *Stone* v. *Jackson* (31) where it is pleaded by a husband that his wife fell into an open vault or cellar and was thereby grievously bruised and injured, and so remained and continued for a long space of time; whereby the plaintiff during all that time, lost and was deprived of the comfort, benefit and assistance of his said wife in his domestic affairs. Here the report shows that there was only a partial loss of consortium.

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(25) 9 H. L. C. 577, 589.
(26) Ibid. 598.
(27) (1791) Peake 77 [55].
(28) [1935] 2 K. B. 209.
(29) (1853) 2 E. & B. 216.
(30) [1946] 2 K. B. 517.

[COHEN, L.J. The issue turned on whether there was a public way where the vault was. It was held that there was no evidence of a public way and there was no demurrer.]

The declaration claimed only for impairment of the consortium.

In *Guy* v. *Livesey* (32) where the action was for the beating of a wife by the defendant "per quod consortium uxuris suae "for three days amisit", the court said that the action was not brought for the harm done to the wife, but it was brought for the particular loss of the husband, for that he lost the company of his wife, which is only a damage to himself, for which he shall have this action, as the master shall have for the loss of his servant's service. That seemed to be a successful action for impairment or partial loss of the consortium. See also *Macfadzen* v. *Oliphant* (33) where Lord Ellenborough, C.J., on an action brought by a husband for "that the defendant assaulted and "seduced" his wife: "The cause of action in these cases arises "from the time of the injury done by the defendant by the "corruption of the body and mind of the wife; for from that "time she is less qualified to perform the duties of the married "state". There only impairment of the consortium is alleged. The declaration in *Brockbank* v. *Whitehaven Junction Railway Co.* (34) again only claims for partial loss of the consortium.

Paull, K.C., and *G. F. Leslie* for the defendants. The defendants' case is based on five principles: (1.) The plaintiff's cause of action must be founded on what gave rise to the old form of action: "per quod consortium amisit". (2.) Only the husband had the rights on which to found the action, "per quod consortium "amisit". The wife had no such rights. (3.) Today, a wife

(31) (1855) 16 C. B. 199.
(32) Cro. Jac. 501.
(33) 6 East 387.
(34) 7 H. & N. 834.

has all the rights which spring from the religious or quasi-contractual form of marriage. She has none of the rights or the liabilities which spring from the husband's proprietary right in the consortium. (4.) An invitor owes a duty of care to a person or persons on his land and to any persons having, under the old English law, proprietary rights in such persons, such as a master in the case of a servant. The invitor as such owes no duty to anyone else who comes upon his land. (5.) And lastly, if there were here any cause of action, which is denied, it can only be for total loss of the consortium, not for its partial loss, however serious, nor for its impairment. The words are "per "quod consortium amisit".

The right of consortium was owned only by the husband and by him alone. It is the duty of the wife to reside and consort with her husband. As to the conjugal rights between the parties, each had the power to go to the Ecclesiastical Court and say: "I want my rights". But the wife never has had, and has not, any right to property in the consortium as had her husband: see the judgments of Greer, L.J., and of Slesser, L.J., in *Place* v. *Searle* (35), the enticement case. Slesser, L.J., said: "If the "matter is considered as one of principle, this kind of action "is founded upon a violation of a legal right and so we have "to inquire whether the defendant has done something which "amounts to such a violation. The matter is put very clearly "in *Allen* v. *Flood* (36) by Lord Watson in these words (37): "'He who wilfully induces another to do an unlawful act which, "'but for his persuasion, would or might never have been com-"'mitted, is rightly held to be responsible for the wrong which "'he procured'". *Place* v. *Searle* (35) and *Gray* v. *Gee* (38) could have been decided without reference to the proprietary right of a husband in the consortium of his wife.

A wife has no right to the consortium of her husband, as a right of property, such as has her husband. If her duty of consortium is taken from her or impaired by a third party she has no remedy at common law, unless the impairment is deliberate, i.e., malicious. Mental stress or strain on a mother or wife brought on by the stress of nursing a son or husband gives neither a right of action against a tortfeasor who has injured the husband or son. But see *Hambrook* v. *Stokes Brothers* (39)

(35) [1932] 2 K. B. 497, 520.
(36) [1898] A. C. 1.
(37) Ibid. 107.
(38) 39 T. L. R. 429.
(39) [1925] 1 K. B. 141.

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where a husband recovered under the Fatal Accidents Act for the loss of the services of his wife who suffered from nervous shock and consequent death for being present at an accident and from fear of her children's safety from what she saw. A master who has lost the services of his servant by the wrongful act of a tortfeasor to the servant has a cause of action. But if the master is so injured and the servant loses his job, the servant has none.

Blackstone in vol. 3 of his Commentaries (5th ed.), at p. 139, enumerates the injuries that may be offered to a person considered as husband: abduction, adultery and beating or otherwise abusing the wife. On p. 140, he continues: "But if the beating "or other maltreatment be very enormous, so that thereby the "husband is deprived for any time of the company and assist-"ance of his wife, the law then gives him a separate remedy "by an action of trespass, in nature of an action upon the case, "for this ill-usage, per quod consortium amisit; in which he "shall recover a satisfaction in damages". Then at p. 143 Blackstone writes: "The wife cannot recover damages for beating "her husband, for she hath no separate interest in anything "during her coverture". Just before, he writes: "The loss "of the inferior" (wife, child and servant) "by such injuries "is totally unregarded. One reason for which may be this: that "the inferior hath no kind of property in the company, care or "assistance of the superior" (husband, parent and master) "as "the superior is held to have in those of the inferior; and there-"fore the inferior can suffer no loss or injury". It is clear, therefore, that in Blackstone's day a wife could not recover damages for the beating of her husband. The Married Women's Property Act, 1882, reduced the rights of a husband in the property of the marriage: but it did not give to a married woman a right which she had not previously possessed either as a feme sole or as a married woman. The right here suggested of suing a person who impairs her duty of consortium or deprives her of the consortium of her husband is a right she has never had.

If a man has contracted with X to perform some act and I injure the man by negligence so that he cannot perform that act, X has no cause of action against me. Consortium from the point of view of the husband is the duty of the wife to reside and consort with the husband. See the passage from the third edition of Lush on Husband and Wife, at p. 3, quoted by Scrutton and Greer, L.JJ., in *Place* v. *Searle* (40): "It is the duty of

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(40) [1932] 2 K. B. 497, 513, 517.

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"the wife to reside and consort with her husband. This is "a duty which she owes to him". The foundation of the husband's right is proprietary. Holdsworth in vol. 8 of his History of English Law, at p. 430, writes: "The husband's "interest in his wife's consortium, unlike the parent's interest "in the consortium of his children, was considered to be "sufficiently proprietary to support an action of trespass. This "is quite distinct from the right which the husband had, jointly "with his wife, to sue for wrongs committed against her. The "latter right depended upon the incapacity of the wife to sue "in her own name".

Coming to *Lynch* v. *Knight* (41) the judicial dicta were those of Lord Wensleydale and Lord Brougham in my favour and those of Lord Campbell, L.C., and Lord Cranworth against me. In the Irish Court of Exchequer Chamber Baron Hughes said (42): "The consortium of husband and wife is, in my opinion, the "right of the husband. . . . The consortium is, as it were, the "property of the husband"; if it were the personal chattel of the husband, "the wife could not sustain any action in respect "of it. The loss of the consortium is damage accruing to the "husband, and, in my opinion, to the husband only. I am "therefore of opinion that this being the wife's action, founded "only on her loss of the consortium of her husband, is not "sustained".

No common-law court will enter upon a consideration of the question of what exactly were the sexual relations of husband and wife before and after marriage. Unless it can be shown that a wife had such a right to the consortium of her husband as has been claimed here, in the days of Blackstone and the earlier authorities, it is clear that nothing has occurred which has given her such a right since. Change of public opinion as to the status of a wife cannot give her a right which she has never had. She did not obtain this right under the Married Women's Property Acts of 1870 or 1882. The consortium is not broken by the physical separation involved by the husband going abroad: *Davies* v. *Elmslie* (43).

[Lord Asquith. Does that decision not suggest that the wife has a right to the consortium?]

We should say rather to conjugal rights. The rights of husband and wife are not mutual. A wife has no right to damages for the adultery of her husband. That is a right which in the old fashioned language of Blackstone " the superior " has, and " the inferior " has not, got. There is a duty on the husband to maintain the wife; but there is no duty on the wife to maintain the husband, except under statutory exceptions such as that of public assistance (see s. 42 of the National Assistance Act, 1948) and also under s. 10, sub-s. 2, of the Matrimonial Causes Act, 1937, now repealed, which is retained in s. 19, sub-s. 4, of the Matrimonial Causes Act, 1950. The husband here had recovered in his action for negligence, as an element in his damage, for any impairment of his ability to perform his obligation of maintaining his wife, and so the wife recovered indirectly the value of any loss of her consortium. Apparently a married woman has no right at common law to recover special damages if her husband be injured, just as a servant cannot obtain damages on the ground that he has lost his livelihood through his master's injury by the carelessness of the defendant. The law as to presumption of advancement or gift in the case of husband to wife or wife to husband is not the same. The rights of husband and wife inter se are not mutual. Salmond in his own last edition of the Law of Torts (6th ed.), sets out in a note the two contrary opinions expressed in *Lynch* v. *Knight* (41).

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(41) 9 H. L. C. 577.
(42) (1860) 5 L. T. 292.
(43) [1938] 1 K. B. 337.

There is no indication of any such cause of action as is here claimed in any edition of Bullen and Leake's Precedents of Pleadings. McCardie, J., said in *Butterworth* v. *Butterworth and Englefield* (44): " Apparently the law takes the view that the " wife has no such right of control or claim to a husband's services " as is possessed by the husband with regard to the wife ". That is our contention: she has conjugal rights but no right to the consortium. If it is thought that the decision in *Gray* v. *Gee* (45) can be supported on the principle laid down in *Lumley* v. *Gye* (46), I do not dispute the correctness of that decision; but if the court thinks otherwise, I submit that the decision in *Gray* v. *Gee* (45) is wrong. In Lush on Husband and Wife (4th ed.), the editor after giving the opinion of Lord Wensleydale in *Lynch* v. *Knight* (41) writes: " It would seem, therefore, uncertain " whether an action will be at the suit of the wife for loss of " consortium as, indeed, for any other consequential damages " which she may have suffered from an act of trespass to her

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(41) 9 H. L. C. 577.
(44) [1920] P. 126, 130.
(45) 39 T. L. R. 429.
(46) 2 E. & B. 216.

"husband, except possibly when the trespass is committed upon "the husband with intent to injure the wife".

An ordinary domestic servant is the servant of the husband and not of the wife, when husband and wife are living together: see *Peters* v. *Jones* (47) and *Hamilton* v. *Long* (48).

An invitor owes a duty of care to a person or persons on his land and to any persons who have proprietary rights in such persons, such as a master in the case of a servant. There is no case in the books where the duty has been extended to anyone else. If a man is terribly injured on X's land so that he has a cause of action against X and on his reaching home his wife or his mother has a mental or nervous breakdown from seeing his injuries and nursing him, neither the mother nor the wife has a cause of action against X. Again, if I injure a man, so that as a result he becomes neurasthenic, and by reason of the neurasthenia he flies into a temper and strikes his wife or his mother, neither has an action against me. Where a mother helps a daughter in the house in doing household duties and the mother is injured by X so that she cannot perform the services, there is no known case where the daughter has a cause of action against X. Then if I injure a man who employs a servant A, if A is discharged because his master can no longer employ him, A has no action against me. See also the judgment of Lord Russell of Killowen in *Bourhill* v. *Young* (49).

Again, the established action of a husband "per quod "consortium amisit" is for the loss—the total loss—of the consortium. The husband has no action for general damages on this cause of action or for loss of part of the consortium or for diminution of the consortium. The word used in pleadings is "amisit". Here there was no total loss of the consortium or for diminution of the consortium. The word used in pleadings is "amisit". Here there was no total loss of the consortium since the husband and wife are living together under the same roof and the loss is only that of sexual relationship. No doubt the loss is substantial and serious, but it is not a loss of the consortium. The same verb is used in the describing the action "per quod servitium amisit". It is impossible to divide up consortium and sue for the impairment of any part of it. In *Winsmore* v. *Greenbank* (50), an action for enticing away the plaintiff's wife, the declaration was that from August to December, 1742, the time of her death, the wife continued absent and apart and secreted herself, etc., "whereby the plaintiff during "all that time totally lost the comfort and society of his said "wife and her aid and assistance in his domestic affairs".

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(47) [1914] 2 K. B. 781.

(48) [1903] 2 I. R. 407; [1905] 2 I. R. 552.

(49) [1943] A. C. 92, 101.

(50) Willes 577, 579.

Further, it is submitted that the sexual side of consortium has never been dealt with by the civil courts. Lord Birkenhead in *Russell* v. *Russell* (51) cited Lord Halsbury, who in the *Poulett Peerage* case (52) referred to the rule "which I think most wisely "and properly protects the sanctity of married intercourse; and "forbids it to be inquired into in any court of law". The exception appears to be in cases of cruelty. Then there are certain cruelty cases. In *Weatherley* v. *Weatherley* (53), the case which decided that the mere refusal of sexual intercourse by one of the spouses could not constitute desertion within the Matrimonial Causes Act, 1937, Lord Jowitt, L.C., said (54): "This further consideration cannot be disregarded. It is . . . "most undesirable, save where we are clearly enjoined by statute "so to do, to seek to discover or reveal the secret intimacies of "the marriage bed. If a question arises whether the marriage "has been consummated, no doubt this may be necessary. It is "not, I think, right that we should do so in cases such as the "present". Those observations apply to this case. Lastly, the injury to the wife's consortium was not a direct consequence of the negligence alleged and the damage to the wife was too remote.

It is submitted that this cause of action does not lie at the suit of a wife; but, if it did, it would only lie for the total loss of the consortium.

Leslie following. In Bracton's De Legibus et Consuetudinibus Angliæ at folio 155 will be found the passage "Patitur autem "injuriam quis, non solum per seipsum sed etiam per alios quos "habet in potestate, sicut per liberos suos et uxorem suam. Vir "autem agere poterit de injuria facta uxori suæ, sed non e "contrario". Here is an early statement on the matter: "A "husband also may bring an action for an injury done to his "wife but not the converse". See also *Newton and Uxor* v. *Hatter* (55), where judgment was arrested because a wife cannot be joined in an action with the husband for a battery on the husband. In Bacon's Abridgment under the title "Baron and "Feme" (*k*) (7th ed.), at p. 732–3, is written: "But the baron

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(51) [1924] A. C. 687, 700.
(52) [1903] A. C. 395, 399.
(53) [1947] A. C. 628.
(54) Ibid. 633.
(55) (1706) 2 Ld. Raym. 1208.

"may bring an action alone for the battery, carrying away and "detaining of his wife, per quod solamen et consortium of his "said wife amisit, because the action is founded upon the special "damage done to himself, and will be no bar to another action "brought by baron and feme, or by the feme after the death of "the baron, for the same battery". There is, of course, no reference to any action by the feme for battery to the baron per quod solamen et consortium of her said husband amisit. In the Restatement of the Law promulgated by the American Law Institute in vol. 3 on Torts, at para. 695, is the statement: "A "married woman is not entitled to recover from one who, by "his tortious conduct against her husband, has become liable to "him for illness or other bodily harm, for harm thereby caused "to any of her marital interests, or for any expense incurred "in providing medical treatment for her husband".

Shepherd, K.C. and *R. Withers Payne*, for the third parties, adopted the argument for the defendants.

Pritt, K.C., replied.

Cur. adv. vult.

May 10. The following judgments were read:—

Birkett, L.J. The precise issue before the court in the present appeal may be thus stated: are the defendants who have been guilty of negligence causing injury to a husband liable also to the wife in the same or a separate suit for any injury to or impairment of her consortium with her husband arising from that negligence which she can prove. The novelty of the claim is not unimportant, and naturally it was discussed in the interesting and able arguments before us, so that a few words on that topic might not be out of place here. Our attention was drawn to *Hitaffer* v. *Argonne Co. Incorp.*, decided in the United States Court of Appeals for the District of Columbia Circuit on May 29, 1950 (56). The husband in that case had been injured through the negligence of the defendants, and the wife brought an action against the defendants alleging that in consequence of her husband's injuries she had been deprived of "his aid, assistance and enjoyment, "specifically sexual relations"; and the court held that the wife had a cause of action for her loss of consortium due to the injuries suffered by her husband through the negligence of the defendants. In the course of the judgment the court (Clark, Wilbur K. Miller and Fahi, Circuit Judges) said (57): "Although this is the first

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(56) (1950) 183 Fed. R. 811.

(57) Ibid. 812.

" time this question has been presented to this court, we are not " unaware of the unanimity of authority elsewhere denying the " wife recovery under these circumstances. As a matter of fact " we have found only one case in which the action was allowed, " and that authority has been effectively overruled ". Some thirty cases from different parts of the United States are mentioned in a footnote to show the unanimity of opinion and authority to which the court referred; and the court claimed in its judgment to have " pierced the thin veils of reasoning " of the thirty cases mentioned, and added that the reasoning was " specious and fallacious ". In the Restatement of the Law adopted and promulgated by the American Law Institute in vol. 3, the Law of Torts, at para. 695, the matter is thus stated: " A " married woman is not entitled to recover from one who, by his " tortious conduct against her husband, has become liable to him " for illness or other bodily harm, for harm thereby caused to any " of her marital interests, or for any expense incurred in providing " medical treatment for her husband ". In the United States, therefore, the issue had been raised in the form in which it is raised before us, but, apart from the decision I have mentioned, the claim of the wife has been denied. The reasons for this denial, collected from the thirty cases mentioned in *Hitaffer's* case (56), are set out in the judgment and need not be referred to here.

In two cases in England the issue has been raised, but in a form quite different from the present case. In the great case of *Lynch* v. *Knight* (58) there was much division of opinion concerning the wife's right to consortium, to which I will refer later; but the case was decided against the plaintiff on the ground of remoteness of damage. In *Davies* v. *Solomon* (59) no decision was given on the point.

The question at issue in the present case may therefore be said to be new; and the old question arises whether it is new in principle or merely new in the instance. The trial judge, after reviewing the evidence and examining and analysing the decisions in the relevant cases with great care, dismissed the plaintiff's claim. The grounds on which he did so appear to be: (a) following the principles laid down in what are comprehensively termed the " enticement " cases (to which I shall refer hereafter) the defendants had not done any active or intentional or deliberate act designed to break up or to injure the wife's consortium, and indeed had no knowledge of the plaintiff at the date of the negligence in 1946; and (b) if the plaintiff possessed a legal right to the consortium of her husband, the defendants' responsibility to her husband for their negligence towards him cannot be extended so as to make them responsible to Mrs. Best, when they had no intention "wilfully, knowingly or impliedly" of putting an end to or indeed impairing the consortium of Mrs. Best.

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(56) 183 Fed. R. 811.

(58) 9 H. L. C. 577.

(59) (1871) L. R. 7 Q. B. 112.

The judge was also of opinion that, if Mrs. Best had been entitled to succeed because of the loss of consortium, she would have been equally entitled to succeed, if she had only been able to show an impairment of the consortium and not a complete loss or deprivation, though, in view of his decision on the other points, he did not discuss the last point at any length.

The submissions made to us on behalf of Mrs. Best covered a very wide field, and it is not too easy to summarize them and to do justice to counsel; but, perhaps, they may be stated in this way:

(a) The right to consortium by a husband or wife is now a well-recognized right at common law. It is fully mutual at this time of day, each spouse having equal rights, and the law relating to consortium is the same for husband and wife.

(b) The right to consortium is quite distinct from servitium. Servitium is an adjunct of consortium and not an essential ingredient.

(c) Any unjustifiable interference with the consortium of the husband or wife gives the injured spouse a right of action against the party so interfering. This interference may arise from any tortious action, such as trespass or negligence, and applies also to the act of inciting a spouse to injure or destroy the consortium.

(d) Inciting a spouse to injure or destroy the consortium is a separate tort, and knowledge of the consortium by the wrongdoer is an essential element; but, in the case of an injury to the consortium due to the negligence of the wrongdoer, knowledge of the consortium is not an essential element.

(e) The view that the right of consortium depends on proprietary interest is now obsolete, and the growth and development of the law, particularly during the last seventy years, as evidenced by the changes in the position of married women made by statute, make the wife's position exactly the same as that of the husband. The few remaining differences (such as the husband's right to sue for damages for adultery, and the husband's liability to maintain his wife, whereas the wife has no right to sue for damages for adultery and is under no duty to maintain her husband, save in very special cases), make no difference in the matter of consortium.

(f) In the present action it is not incumbent on the wife to show complete loss of the consortium: any interference with it, or any impairment of it, or injury to one element of it will suffice to support the cause of action.

The submissions made by counsel for the defendants may also be shortly summarized in this way:

(a) If the plaintiff has any cause of action in the present case (which is denied) then it must be based on the principles which gave rise to the old form of action per quod consortium amisit, and, in law, the plaintiff has no rights sufficient to sustain the action, the husband alone possessing these rights.

(b) It is conceded that the status of the wife has been greatly changed by the growth of public opinion and the legislation of the last seventy years, and today she possesses all the rights which spring from the religious or quasi-contractual side of marriage, but she is still without the rights or liabilities which spring from the husband's proprietary rights in the consortium.

(c) The injury to the wife's consortium in the present case was consequential on the injury to the husband, and, as the wife has no proprietary right to consortium, the defendants are under no liability to her.

(d) Mere injury to the consortium is not enough; a total loss of consortium must be proved. The present action is merely a claim for damages for the loss of sexual intercourse, although it is recognized how grievous the loss of children may be, and the courts will not inquire into such matters between husband and wife. Consortium is one and indivisible, and there has been no loss of consortium in the present case, for the parties are still living together under the same roof.

The term "consortium" is nowhere defined with complete precision. The judge in the court below defined it as "the "comfort and the well-being and the decent and proper enjoyment of the affection of her husband". In some cases it is defined as "comfort and society": in some as "comfort and "assistance", as in *Winsmore* v. *Greenbank* (60). Blackstone, in the third volume of the Commentaries on the Laws of England (5th ed.), at p. 140, writes: "if the beating or other "maltreatment be very enormous, so that thereby the husband

(60) Willes 577.

"is deprived for any time of the company and assistance of his "wife, the law then gives him a *separate* remedy by an action "of trespass, in the nature of an action upon the case for this "ill-usage per quod consortium amisit in which he shall recover "a satisfaction in damages". In Bullen and Leake's Precedents of Pleadings (3rd ed.), at p. 340, is to be found a declaration by a husband for enticing away his wife, and it reads: "wrongfully enticed and procured the said G. unlawfully and "without the consent and against the will of the plaintiff to "depart and remain absent from the home and society of the "plaintiff". In *Lynch* v. *Knight* (61) the term used by Lord Campbell, L.C., and by Lord Cranworth is "conjugal society", and Lord Wensleydale says, "the wife sustains only the loss of "the comfort of her husband's society and affection". In Jenks's Digest of English Civil Law (4th ed.), at para. 931, the words are "society and comfort", and in Lush on Husband and Wife (2nd ed.), at p. 4, the duty of the wife is said to be to "reside and consort" with her husband.

It is important, therefore, to come to a clear conclusion about what meaning is to be given to the word "consortium". In a notable dissenting judgment given in the case of *Wright* v. *Cedzich* (62), Isaacs, J., said: "The mass of indefinable duties "and rights are conveniently gathered under the one word 'con-"'sortium', and that is a word of equality, subject only to "natural, and not legal, diversities". *Davies* v. *Solomon* (63) was decided in 1871, some ten years after *Lynch* v. *Knight* (61) and before the passing of the Married Women's Property Act, 1882—husband and wife sued for a slander on the wife, and the damage alleged was said to be under two heads:—(a) loss of cohabitation with her husband, and (b) loss of hospitality of friends. Blackburn, J., with the approval and concurrence of Mellor and Hannen, JJ., described the first head of damage as "loss to the plaintiff of the consortium of her husband"; but the court found it unnecessary to decide whether that was temporal damage sufficient to maintain the action, because they found the second head sufficient to do so. Blackburn, J., began his judgment by saying: "The sole difficulty in deciding the case is "caused by the opinion of Lord Wensleydale in *Lynch* v. "*Knight* (61)".

Lynch v. *Knight* (64) is of great importance in this connexion.

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(61) 9 H. L. C. 577.

(62) (1929–30) 43 C. L. R. 493, 510.

(63) L. R. 7 Q. B. 112.

(64) 9 H. L. C. 577. For a report of the arguments in Ireland (1859–60) see 5 L. T. 292.

The case was originally argued in the Irish Court of Queen's Bench and later in the Irish Court of Exchequer Chamber. Both courts gave judgment for the husband and wife. The House of Lords reversed the decision on the ground of remoteness of damage. On consortium, the view adverse to the wife's claim was thus stated. Hughes, B., said (65): "The consortium of "husband and wife is, in my opinion, the right of the "husband. . . . The consortium is, as it were, the property of "the husband". Fitzgerald, B., said (66): "I can find nothing "in the wife's loss of her husband's society affecting her material "interests. . . . The loss of conjugal society is a special damage "to the husband and the husband only who has thereby lost the "society of one who is in law considered as his servant".

In the House of Lords, Lord Wensleydale said (67) that there was considerable doubt upon the question, but he had made up his mind that no such action would lie. The important passage of his speech is (68): "The relation of the husband to the wife "is in most respects entirely dissimilar from that of the master "to the servant, yet in one respect it has a similar character. "The assistance of the wife in the conduct of the household of "the husband and in the education of his children resembles the "service of a hired domestic, tutor or governess; is of material "value, capable of being estimated in money. . . . It is to the "protection of such material interests that the law chiefly "attends". Lord Campbell, L.C., took the opposite view, and expressly said (69): "the wife is not the servant of the "husband". Lord Cranworth was strongly inclined to think that Lord Campbell's view was correct (70). Lord Brougham was "rather inclined to think that the action would not lie" (71).

It is clear that the views expressed turned on the true meaning of the word "consortium"; and in this case Mr. Paull, for the defendants, did not hesitate to say that the reason the present action will not lie is the reason stated by Lord Wensleydale. He cited in support of his argument the passage from Blackstone's Commentaries of the Laws of England (5th ed.), vol. 3, ch. 8, at p. 142, and in particular on the words: "We may observe in "these relative injuries"—Blackstone was speaking of injuries suffered by a husband, a parent, a guardian or a master—"notice "is only taken of the wrong done to the superior of the parties

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(65) 5 L. T. 293.
(66) Ibid. 294.
(67) 9 H. L. C. 577, 597.
(68) Ibid. 598.
(69) Ibid. 589.
(70) Ibid. 595.
(71) Ibid. 593.

" related, . . . whilst the loss of the inferior "—Blackstone was speaking of the wife, the child, the ward and the servant—" by " such injuries is totally unregarded ". Mr. Paull was duly apologetic about quoting such language, which, it must be confessed, falls a little strangely on modern ears, but submitted that the husband's right to sue was because of his proprietary right, and the wife, lacking such proprietary right, had no such action.

The decisions in what are usually called the enticement cases must now be considered. *Winsmore* v. *Greenbank* (72) was an action brought on the case for enticing away and detaining the plaintiff's wife, for the loss of " the comfort and society " of the wife and " her aid and assistance in his domestic affairs ". The Court of Common Pleas allowed the action, although the action for loss of consortium had formerly been considered as founded on trespass. In *Gray* v. *Gee* (73) it was held that a wife can maintain the action for enticement against anybody who persuades her husband to leave her. This was a most important decision, and would seem to be new in principle. It was followed in *Place* v. *Searle* (74) by the Court of Appeal. Scrutton, L.J., said (75): " It seems to be clear that at the present day a " husband has a right to the consortium of his wife, and the " wife to the consortium of her husband, and that each has a " cause of action against a third party who, without justification, " destroys that consortium "; and again (76): " There being such " a right, it follows, and it has been so decided in numerous cases, " that any person who, without justification, interferes with that " right, is liable to an action in tort ". Whether Scrutton, L.J., intended to describe two different things in his use of the word " destroys " and the word " interferes " is not too clear. He may have meant an interference that destroys the consortium or he may have meant an interference that only injured and did not destroy. In *Newton* v. *Hardy* (77), Swift, J., held that a married woman had a legal right to the consortium of her husband and could recover damages from anybody who violated that right. He said (78): " I cannot for myself think that now, as Lord Camp- " bell, L.C., said in *Lynch* v. *Knight* (79), the right to sue for " damaging the consortium is limited to the husband. It is a " mutual right of husband and wife, and, if anybody breaks into " it and violates it, then either of them in my view is entitled

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(72) Willes 577.
(73) 39 T. L. R. 429.
(74) [1932] 2 K. B. 497.
(75) Ibid. 512.
(76) Ibid. 513.
(77) 149 L. T. 165.
(78) Ibid. 166.
(79) 9 H. L. C. 577, 589.

"to sue for damages in respect of that wrong". I do not find that Lord Campbell, L.C., used the word "damaging"; what he is dealing with is the loss of consortium. The passage in *Lynch* v. *Knight* (80) is: "Although this is a case of the first "impression, if it can be shown that there is presented to us a "concurrence of *loss* and *injury* from the act complained of, we "are bound to say that this action lies. Nor can I allow that "the loss of *consortium*, or conjugal society, can give a cause of "action to the husband alone. . . . But the loss of conjugal "society is not a pecuniary loss, and I think it may be a loss "which the law may recognize, to the wife as well as to the "husband. The wife is not the servant of the husband". As I say, I do not find that Lord Campbell, L.C., used the word "damage".

It would therefore appear to be quite plain that in the enticement cases the courts have recognized a legal right in the wife to the consortium of her husband, however the word is defined; but, in order to succeed in the action against anybody who procures, entices or persuades the husband to forsake the consortium, she must show (a) that the person sued knew of the consortium; (b) that the person sued has done some wilful act to deprive the wife of the consortium; and (c) (more doubtfully) that a loss of the consortium must be proved, and not a mere impairment.

Mr. Paull meets these formidable decisions by saying that they are consistent with the wife's rights in ecclesiastical law, or the rights which spring from the religious or quasi-contractual side of marriage. The difficulty about that argument is that no such distinction is made in the cases, and Swift, J., was expressly basing himself upon Lord Campbell's observation in *Lynch* v. *Knight* (80). And the second difficulty arises from applying the view of Lord Wensleydale or that of Blackstone to the year 1951. As Isaacs, J., said in *Wright* v. *Cedzich* (81): "When we see that women are admitted to the capacity of "commercial and professional life in most of its branches, that "they are received on equal terms with men as voters and legis- "lators, that they act judicially, can hold property, may sue "and be sued alone, may and frequently have to provide a home "and maintain the family, when, too, they are organized in "time of national danger as virtual combatants in defence of "the country, it is time, I think, to abandon the assertion that "in the eye of the law they are merely the adjuncts or property

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(80) 9 H. L. C. 577, 589.

(81) 43 C. L. R. 493, 505.

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"or the servants of their husbands". This language was used twenty years ago, and the legislation of the past twenty years makes the position of the wife even stronger than when Isaacs, J., used the words I have quoted.

Mr. Paull's argument must be carefully considered, because it may be thought that the word "consortium", when used in the enticement cases, has a much wider connotation than in the cases where the husband sued for loss of consortium, and, now that the wife may sue without joining her husband, it is reasonable to permit her to sue for the loss of the companionship of marriage. In *Guy* v. *Livesey* (82), the claim was for loss of consortium only for injuries done to the wife "per quod consortium uxoris suæ for three days amisit"; and in *Hyde* v. *Scissor* (83), the element of "servitium" does not seem to have been very prominent.

If I may assemble and summarize the arguments at this stage, for the wife it is said:

(a) The enticement cases have established, as Scrutton, L.J., said in *Elliott* v. *Albert* (84), a well-established cause of action to a wife where the defendant had deprived her of the consortium of her husband; (b) "servitium" in the narrowest sense was never an essential ingredient of the husband's action for loss of consortium: it was at the most an adjunct; (c) the common law in 1951, in accordance with its flexible and adaptable characteristics, should take account of the modern status of the wife, and the "services" which the husband renders to the wife as well as the "services" the wife renders to the husband, and say that it is no longer possible to view the wife as an "inferior" in Blackstone's use of the word, and that the historical precedents are no longer binding; (d) to allow the wife a right to recover for the loss of her consortium against those who have committed a wrong against her husband is not a new principle but is merely new in the instance.

The arguments against the wife could be summarized in these words: (a) in no case has a wife ever succeeded in an action of this nature; (i) the wife is not, nor has she ever been, entitled to the services of her husband, which is the foundation of the actions; (ii) although the wife has a similar interest in the society of and sexual relations with her husband as he has in such relations with her, the law has never recognized her right to recover against one who has caused harm to such interests by

(82) Cro. Jac. 501.

(83) (1619) Cro. Jac. 538.

(84) [1934] 1 K. B. 650, 659.

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conduct not intended to harm them; (iii) the enticement actions are based on the intentional violation of a legal right and not otherwise, and have no bearing on the question of negligence towards a husband occasioning loss of consortium to the wife.

(b) The husband is under a duty to support his wife according to his station in life, and recovers in his action for negligence as an element in his damages for any impairment of his ability to perform his obligation, and thus the wife recovers indirectly the value of any loss of her consortium. (c) The injury to the wife's consortium is not a direct consequence of the negligence alleged, and is too remote and consequential to be assessed in money. (d) Where the claim is for damages for loss of sexual intercourse the courts will not entertain it. If they did so they would be faced with a multiplicity of actions in every case where a husband was injured for the loss of sexual intercourse for a fortnight or for a year; and into such relationships between husband and wife the courts will not enter. (e) The wife's interest in the marital relationship is not a right of property or derived from a contract, and it lies within an area into which the law will not enter except of necessity.

The conclusions to which I have come have not been reached without some hesitancy and doubt, which may perhaps be pardoned as natural in this highly controversial field. It would appear from the history of the husband's action for loss of consortium that it was a very anomalous thing, and, that being so, it ought not to be extended. But this would leave the husband in the possession of a cause of action which was denied to the wife, and that is a position that I am not prepared to take up. The husband's cause of action, if based on the idea of " servitium ", is based on a view of the law which, in my opinion, is quite obsolete and discredited. It is quite impossible to reconcile it with modern thought and modern ideas. Lord Wensleydale in *Lynch* v. *Knight* (85) could say that the position of a wife resembled that of a hired domestic, tutor or governess. It is much to be doubted whether anybody today would subscribe to such language or feel it to be in conformity with the recognized and established position of the wife. In so far, therefore, as a distinction in law is sought to be made between the position of a husband and that of a wife in the matter of consortium on the ground that the husband has a proprietary interest in the wife whereas the wife has no corresponding interest in the husband, I am of opinion that it no longer has any application.

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(85) 9 H. L. C. 577.

Further, I think that the decisions in the enticement cases, and the character of the legislation passed in the last seventy years have made a decisive change. The cases which have given the wife the right to sue when an intentional or a malicious act has resulted in the loss of her consortium must apply, I think, when the action is negligent as distinct from intentional. If it is said that the services a wife renders to the husband are an element of the consortium, this would seem to be a most arbitrary separation of the elements of consortium, for it could not be doubted that a husband renders services to the wife, and the exclusion of the wife from any remedy can only be based on what I regard as a quite obsolete view of proprietary interest. So long as the husband is given the cause of action, I cannot see any good reason why the wife should be deprived of it. I am of opinion, therefore, that today the rights of husband and wife in the consortium are fully mutual and completely equal, before the law, and the wife is entitled to bring an action when she has been deprived of her consortium by the negligent act of a third person.

I have left to the last what I regard as the most important and the most difficult question in the case. The plaintiff in this case claimed originally for loss of the consortium, but by an amendment of the statement of claim she claimed damages for interference with her consortium. The question is whether it is enough to show some impairment of the consortium or whether a loss must be proved. It was admitted in this case that the husband and wife were living together under the same roof, and to that extent at least the consortium still existed. It was not contended that the wife had lost the consortium of her husband, but that one element of it, and a most important element, that of sexual intercourse, had been taken away, with all the consequences that entailed in the loss of children and the full family life. It was contended that that was an unjustifiable interference with the consortium, for which the wife could claim damages.

At first sight it would seem to be a logical thing to say that, if a wife has a legal right to the consortium of her husband, then she would have a remedy for any unjustifiable interference or disturbance or impairment of it. But I do not think that the matter is quite as simple as this. There would appear to be no case where damages have been recovered save for the loss of, as distinct from any impairment of, the consortium. In the Restatement of the Law adopted and promulgated by the American

Law Institute in vol. 3, the Law of Torts, at p. 693, it is said that: "the husband is also entitled to recover damages for the loss of "his wife's society and companionship in the home, including "any impairment of her capacity for sexual relations"; and at p. 696: "The wife has a similar interest in the society and sexual "relations with her husband, as he has in such relations with her. "However, the law has not recognized her right to recover against "one who has caused harm to such interests by conduct which "is not intended to harm them". This statement does more than assert the proprietary interest of the husband alone: it assumes that the consortium may be split up and the various strands which are interwoven into the whole may be separated and dealt with singly and apart.

The view I am inclined to hold is that consortium cannot be dealt with in that way. The history of the action giving the husband his rights shows its somewhat artificial character. But, if consortium is to be capable of separation into many and extremely diverse elements, so that the impairment of any one element, however slight, will give a cause of action, then the prospects are rather overwhelming. Companionship, love, affection, comfort, mutual services, sexual intercourse—all belong to the married state. Taken together, they make up the consortium; but I cannot think that the loss of one element, however grievous it may be, as it undoubtedly is in the present case, can be regarded as the loss of the consortium within the meaning of the decided cases. Still less could any impairment of one of the elements be so regarded. Consortium, I think, is one and indivisible. The law gives a remedy for its loss, but for nothing short of that.

For these reasons I think the plaintiff's case fails, and that this appeal should be dismissed.

Cohen, L.J. I have had the opportunity of reading the judgment of my brother Birkett. I agree entirely with the conclusion he has reached, that an action by a wife based on loss of consortium, owing to the negligent, but not malicious, act of a third party causing injury to her husband cannot succeed unless the wife can prove loss, as distinct from impairment, of that consortium. I must, however, add that I entertain some doubt whether even proof of total loss of consortium would enable a wife to succeed where that loss was due to a negligent as distinct from a malicious act of the defendant.

The husband's right to recover in the converse case is, no doubt, now so clearly established that, at any rate in this court, it must be recognized. It seems to me, however, an anomaly. The whole idea of the right of consortium is a vague right. There is nothing concrete about it, with the consequence that a person may trespass on that right without knowing of its existence, for he may not know that the wife is a married woman. It is difficult to see on what principle the right was recognized. It is to be observed, however, that, so far as I have been able to ascertain, in every case where the right was recognized the action was for loss of consortium et servitium. The ratio decidendi may therefore have been that, the husband being entitled to the services of his wife, she was in a certain sense to be regarded as his property. Anyone, therefore, who interfered with that property trespassed on it.

This view derives support from Blackstone's Commentaries on the Laws of England. Describing the nature of the action, he says (5th ed.), in Book 3, at p. 140: "If the beating or other "maltreatment be very enormous, so that thereby the husband is "deprived for any time of the company and assistance of his "wife, the law then gives him a *separate* remedy by an action ". . . upon the case for this ill-usage, per quod consortium amisit, "in which he shall recover a satisfaction in damages". Explaining why, at that time, no corresponding right was recognized in the wife, Blackstone says at p. 142: "One reason for "which may be this: that the inferior hath no kind of property "in the company, care or assistance of the superior, as the "superior is held to have in those of the inferior. . . . The wife "cannot recover damages for beating her husband, for she hath "no separate interest in anything during her coverture".

This view of the position of the wife is, as my brother Birkett points out, now entirely obsolete, and it is, of course, no longer true that a wife has no separate interest in anything during her coverture. None the less, I do not think it necessarily follows that the courts must now recognize a right in the wife entirely corresponding to that of the husband. No doubt in the enticement cases we are bound to do so, in view of the decision of this court in *Place* v. *Searle* (86). But in the enticement cases intentional infringement of the rights of the consort is an essential ingredient in the cause of action. The remedy in that case may therefore be treated as a natural extension of the principle in

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(86) [1932] 2 K. B. 497.

Lumley v. *Gye* (87). Moreover, no injustice can be done to the defendant since, ex hypothesi, his action was malicious.

In cases such as the one before us, however, it is impossible to suggest any malice against the wife on the part of the defendant or any intentional interference with her right of consortium. Moreover, the wife has never had any right of servitium vis-à-vis her husband. It seems to me, therefore, that it would be an extension of a line of decisions in itself anomalous if we were, in such cases as the present, to recognize a right of action in a wife corresponding to that which the courts have recognized as vested in a husband.

In *In re Compton* (88), an attempt was made to extend the line of decisions upholding gifts in favour of the poor relations of a testator to gifts providing for the education of a class of children descended from certain families related to a testatrix. In the lower court I upheld the validity of the gift, saying, in effect, that I could see no distinction in principle between gifts for poor relations of a testator and gifts for the education of a class of his relations, since relief of poverty and education were both charitable objects in the eyes of the law. This court, however, reversed my decision. Lord Greene, M.R., after suggesting a possible distinction on the ground of some special quality in gifts for the relief of poverty, said (89): "Failing such a ground of "distinction, I can only regard the 'poor relations' cases as "anomalous, and I prefer to let them remain as such rather than "to extend the anomaly to a different class of case".

So here I think it may be said that the right of the husband to recover damages in cases such as are indicated by the third count in Bullen and Leake's Precedents of Pleadings (3rd ed.), at p. 340, is an anomaly and ought not to be extended to the case of an action by the wife. True it is, as my brother points out, that this involves the recognition of a distinction between the respective rights of husband and of wife which is contrary to current opinion; but it has never been held that the wife has any right of servitium from the husband, and an extension of the principle to actions by the wife seems to me to involve real hardship on a defendant who will have already paid damages to the husband, in assessing which, allowance will, I think, have been made for the impairment of his ability to perform his obligation to support his wife.

I therefore agree that the appeal should be dismissed.

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(87) 2 E. & B. 216.

(88) [1945] Ch. 123.

(89) Ibid. 139.

LORD ASQUITH OF BISHOPSTONE [read by COHEN, L.J.]. I agree with the conclusions reached by Birkett, L.J., but reach them by a slightly different route.

Until the third decade of this century the overwhelming weight of the authorities, English and American, was opposed to the existence of any such cause of action in the wife as is claimed in this case. There is in my mind no doubt that, until that time at least, medieval notions persisted according to which the rights of a husband as against a wife were entirely different from those of a wife as against her husband. He was, and is still, under a duty to maintain her. She was, and is, under no duty (except in rare cases under statutes dealing with the poor law) to maintain him—a logical enough arrangement when the whole of her property vested in him on marriage. He was entitled to damages against any man with whom she committed adultery: she had no reciprocal right against an intervener. She owed him, theoretically, " services "—" servitium ". He owed her none. The relationship still in law retained the impress of the primitive notion that the wife, her " services " and the comfort of her society—her " consortium " and " servitium "—were the property of the husband, any encroachment on which conferred on him a cause of action in the nature of trespass. (See Bullen and Leake's Precedents of Pleadings (3rd ed.), at p. 340, and Blackstone's Commentaries on the Laws of England (5th ed.), vol. 3, at p. 142.)

Among pre-1920 cases only in *Lynch* v. *Knight* (90) is it even suggested that the wife had a similar right to her husband's consortium. In that case violation of consortium did not figure as a cause of action available to the wife but as a possible head of damage in respect of a slander published concerning her; and the main point was left undetermined, since it was held that the husband's abandonment of the wife was not a natural or probable result of the slander.

In the third decade of this century several cases were decided on the very different issue of " enticement ", and for the first time the wife was held to possess rights in the consortium of her husband sufficient to vest in her a right of action in respect of his enticement corresponding to the right of action which for centuries the husband had possessed for the wife's enticement. The cause of action was entirely different from that which a husband had for " trespass " to his consortium. It was a cause of action in case, and the action would not lie unless the enticer could be shown to have known that the enticed party was married and that the enticement was a conscious and intentional invasion of the consortium. But in this different connexion, two out of three judges of the Court of Appeal did in *Place* v. *Searle* (91) state that the wife had the same right to the husband's consortium as he had to hers. It seems questionable whether, in relation to the wholly different cause of action involved in this case, where knowledge and intention are, as in trespass generally, irrelevant, those statements amount to more than dicta. Ninety-nine per cent. of the American decisions, as well as the Restatement of the Law of Torts, emphatically negative any such right in the wife as is claimed in this case, and I agree with Cohen, L.J., whose judgment I have had the advantage of reading, that, if the husband's own right had first come in question as res integra today, it would probably have been negatived. As it is, the husband's right being deeply entrenched in authority and the wife's never having been affirmed, I think that the intervention of the legislature would be needed to produce equality either by abolishing the husband's cause of action or by retaining it and conferring a similar cause of action on the wife. I do not believe that at present the wife has such a cause of action as is claimed. Whether she ought to is, of course, quite another question.

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(90) 9 H. L. C. 577.

If I am wrong and she has, it requires, in my view, a total even though temporary loss of consortium to constitute it. No case can be found in actions by the husband where, some separable constituent element only of the consortium being destroyed, an action has been held to lie. Consortium is, in my view, one and indiscerptible. The alternative view, the view that you can disengage a particular strand in the consortial bond and say that, because that strand has been severed, that is enough—in other words the view that impairment of the consortium as opposed to destruction of it will suffice—finds no support in the precedents and leads to insoluble problems in practice. Is a wife to be entitled to sue her husband's employer because, through his negligence, her husband has been lamed, and hence that element of their consortium which consisted in long country walks which they used to share has perished? This seems to me wrong. No-one disputes the importance of the particular ingredient in the consortium which has been extinguished in this case, which includes the wife's capacity to bear children in wedlock: but, once you permit the segregation of a particular ingredient and say that when that has gone the consortium has gone, you enter a region of extreme perplexity and complication. For these reasons I am of opinion that the appeal should be dismissed.

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(91) [1932] 2 K. B. 497.

Appeal dismissed.

Solicitors: *W. H. Thompson; Corbin, Greener & Cook, for Raworth, Lomas-Walker, Butterworth & Wilkinson, Harrogate; Gregory, Rowcliffe & Co., for Neal, Scorah, Siddons & Co., Sheffield.*

C. G. M.

1951
May 2, 3, 4, 7, 22.

Lynskey, J.

KOHNKE *v.* KARGER.

[1949 K. 1345.]

Conflict of laws—Tort—Negligence—Personal injuries—Negligence of two tortfeasors — Judgment against one in France — Damages recovered—Action against other in England maintainable.

The plaintiff was injured in France in a collision between a motor car, in which she was a passenger, and a motor lorry. In proceedings in France she was awarded and recovered against the lorry driver and his employers for his negligence the equivalent of 1,400*l.* as damages for her injuries. She also brought proceedings in England in respect of the same injuries and minor damage to her property against the driver of the motor car for damages for his negligence, undertaking to give him credit for the 1,400*l.* The damages suffered by her were assessed by the English court on ordinary principles of English law at 2,200*l.*

Held, that the plaintiff was entitled to judgment for 800*l.* (the difference between 2,200*l.* and 1,400*l.*), as an English court must assess damages in accordance with the lex fori and the court was not bound by the assessment of damages by the French court, for it was on a different cause of action against a different defendant, and the court was satisfied that the amount awarded by the French court to the plaintiff was insufficient to compensate her for the damage which she had sustained.

Although where a plaintiff elects to sue a defendant abroad and obtains judgment, and that judgment is satisfied, he cannot afterwards sue him in England in respect of the same cause of action, where the plaintiff has two causes of action against separate defendants he may proceed against one in England notwithstanding that he has recovered damages from the other in respect of the same damnum in proceedings abroad, but, semble, the damages awarded in England must be reduced by the amount of the damages recovered abroad.

Barber v. *Lamb* (1860) 8 C. B. (N.S.) 95, and *Taylor* v. *Hollard* [1902] 1 K. B. 676 distinguished.

ACTION.

On July 20, 1948, the plaintiff was being driven as a passenger by the defendant in his motor car when it was involved in a collision with a lorry on Route Nationale No. 44 in Châlons-sur-Marne, France, and as a result both the plaintiff and the defendant sustained personal injuries. The plaintiff, who was employed by the defendant as his housekeeper, was then on holiday with him.

The lorry driver was prosecuted in the correctional court at Châlons-sur-Marne for negligently causing personal injuries to the plaintiff and to the defendant, contrary to the provisions of the French penal code. By the procedure of the court in France injured persons might claim in such criminal proceedings for damages for the personal injuries which they had sustained, but not for damage to or loss of goods. In the proceedings before the correctional court both the plaintiff and the defendant made a claim for personal injuries.

The case was heard on February 11, 1949, and the lorry driver was found guilty of causing personal injuries by negligence to the plaintiff and the defendant. In adjudicating on the civil claims of the plaintiff and the defendant that court held that the accident was attributable as to three-fourths to the lorry driver and one-fourth to the defendant, and assessed provisional damages to be paid by the lorry driver or his employers pending medical examination of the parties. From that decision the lorry driver appealed to the Court of Appeal in Paris.

On December 7, 1949, pending that appeal, the plaintiff issued the writ in the present action against the defendant claiming damages from him in respect of the injuries suffered by her as a result of the collision, and also for the loss of her wrist watch and the destruction of her dress.

On October 11 the Court of Appeal in Paris apportioned the responsibility for the accident as to two-thirds to the lorry driver and one-third to the defendant. The case then came before the correctional court at Châlons-sur-Marne again, and that court awarded the plaintiff a total of 1,400,000 francs, representing 1,428*l*. in sterling, and also awarded 900,000 francs to the defendant (that award having taken into account his one-third responsibility for the accident). On February 10, 1951, the plaintiff's

French lawyer received the amount awarded to her, together with interest and costs. The defendant was called on by or on behalf of the lorry driver and his employers to reimburse them as to one-third of the amount awarded to the plaintiff, and that had been done.

The plaintiff now sued the defendant on the ground that the accident was partly due to his negligent driving.

The defendant denied negligence and also contended that as the plaintiff had taken proceedings in France against the driver of the lorry and obtained judgment against him and his employers for 1,400,000 francs, and had received payment of that amount from them, she could not in law recover damages in a claim against the defendant.

The plaintiff undertook to give credit to the defendant in the present action for any damages she might obtain against the lorry driver and his employers.

Salmon, K.C., and *Mattar* for the plaintiff. The plaintiff is entitled to proceed against the defendant for damages notwithstanding that the judgment against the lorry driver has been satisfied; the damages which were awarded to the plaintiff in France were less than those which would have been awarded by an English court. The judgment against the lorry driver was res inter alios acta. The plaintiff has a right of action against the defendant quite separate and distinct from that against the lorry driver, notwithstanding that the damnum was the same: *The Koursk* (1). A foreign judgment in personam in favour of a plaintiff which has been satisfied is a good defence to an action in England only for the same matter: see Dicey, Conflict of Laws (6th ed.), p. 411, r. 87; *Taylor* v. *Hollard* (2).

The present claim is not barred by the law of France but, even if it were, that would be immaterial. Only the lex fori is material in this respect.

Diplock, K.C., and *R. M. Everett* for the defendants. Where one damnum is caused by separate injuriae for which two or more persons are responsible, a satisfied judgment by a court of competent jurisdiction for that damnum is a bar to any further action in respect of any injuria which caused that damnum: *Bird* v. *Randall* (3); *Morris* v. *Robinson* (4); *United Australia Ld.* v.

(1) [1924] P. 140.
(2) [1902] 1 K. B. 676.
(3) (1762) 3 Burr. 1345.
(4) (1824) 3 B. & C. 196.

Barclays Bank Ld. (5). That principle applies in the present case, and the plaintiff is therefore barred from further relief notwithstanding that the judgment which has been satisfied is a foreign one. It is not open to an English court to question whether the foreign judgment was right: *Barber* v. *Lamb* (6). The matter is not res judicata; the reason for this principle is that the plaintiff has elected to take the judgment of the foreign country: *Taylor* v. *Hollard* (7). It follows that the plaintiff is bound notwithstanding that she is entitled to further relief from the French courts for aggravation of injuries if fresh damage occurs.

[LYNSKEY, J. Does not that prevent the principle from applying: see *per* Lord Mansfield in *Bird* v. *Randall* (8). The basis of his judgment was that complete satisfaction had already been received.]

The judgment now in question is simply one that is open to variation, as is any judgment, for instance, on appeal: see *Nouvion* v. *Freeman* (9) and *per* Scrutton, L.J., in *Beatty* v. *Beatty* (10).

Salmon, K.C., in reply. It is conceded that if A sues B before a tribunal of A's choosing and obtains judgment for *xl.*, which he recovers, he cannot bring B before another tribunal and recover more money in respect of the same matter. He is deemed to have elected to accept the award of the tribunal of his choice and he is bound by that election. *Barber* v. *Lamb* (11) and *Taylor* v. *Hollard* (12) decide no more. But that election can operate only vis-à-vis B, and in respect of the same head of damage. A is barred from suing another person in respect of the same damage only where he has already received complete satisfaction: *Bird* v. *Randall* (13); *Morris* v. *Robinson* (14).

It is sufficient to establish this claim that the tort was unjustifiable in France. That no damages may be recoverable there is immaterial: *Machado* v. *Fontes* (15).

Cur. adv. vult.

May 22. LYNSKEY, J., considered the evidence, found the defendant guilty of negligence, and continued:—Two French

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(5) [1941] A. C. 1.
(6) (1860) 8 C. B. (N.S.) 95.
(7) [1902] 1 K. B. 676, 681.
(8) 3 Burr. 1345.
(9) (1889) 15 App. Cas. 1.
(10) [1924] 1 K. B. 807, 815, 816.
(11) 8 C. B. (N.S.) 95.
(12) [1902] 1 K. B. 676.
(13) 3 Burr. 1345.
(14) 3 B. & C. 196.
(15) [1897] 2 Q. B. 231.

1951

Kohnke v. Karger.

Lynskey, J.

lawyers were called before me to give evidence, Dr. Picarda, on behalf of the plaintiff, and Maître Baugas, on behalf of the defendant. They agreed that negligence causing personal injury was not justifiable in France but on the contrary was both a punishable offence and gave rise to a civil claim for damages. That, of course, is sufficient to give this court jurisdiction to entertain a claim for damages for negligence arising out of an accident happening in France. A good deal of time was, however, spent at the trial before me in endeavouring to ascertain from the French legal witnesses what would have been the position if the plaintiff had brought her present proceedings against the present defendant in the civil courts in France. I am not sure that it helps me very much, but as I am told that this case is likely to proceed further I will set out what I find to be the law in France upon this matter on the evidence before me.

As between the plaintiff and the lorry driver, any claim in respect of the same damage by her against him would be met by the plea of res judicata. But if there were subsequent aggravation of her injuries, she might claim against him in the civil courts further compensation in respect of that aggravation and recover further damages from him. In such further proceedings the civil judge would not be bound by the assessment of damages by the correctional court, but in practice would accept their award in respect of the injuries known at the time of the hearing by the correctional court. The plaintiff would have a right of action in France in civil proceedings against the present defendant, notwithstanding that she had obtained judgment, and satisfaction of that judgment, from the lorry driver. In such proceedings against the present defendant the civil judge again would not be bound by the assessment of damages by the correctional court, but in practice would accept that assessment as accurate. If the civil judge in the proceedings against the defendant accepted that assessment, assuming that there were no aggravation of the injuries, he would dismiss the plaintiff's claim against the defendant on the ground that it was brought without foundation, as the satisfaction of the correctional court's judgment against the lorry driver would have recompensed the plaintiff for the damage for the personal injuries which she had sustained in the accident. Theoretically, however, it would be open to the civil judge in the later proceedings to increase the amount of damages, even if there were no aggravation of the injuries. No question of res judicata would arise in the proceedings against the defendant in France.

Equally, as far as this country is concerned, even if proceedings had been brought here by the plaintiff against the lorry driver, there could be no plea of res judicata although there might in that case be a plea of a satisfied judgment.

Counsel for the defendant did not here suggest that he could rely on a plea of res judicata. His submission was that where one damnum was caused by separate injuriae for which two or more persons were responsible a satisfied judgment by a court of competent jurisdiction for that damnum was a bar to any further action in respect of any injuria which caused that damnum, or, put more shortly, that a satisfied judgment for a single damnum was a bar to another action for the same damnum based on any other injuria causing that damnum. If a person suffers damage as a result of the independent wrongs of two others and recovers, whether as a result of a judgment or otherwise, the whole of his damage from one of them, then apart from any question of subrogation he cannot claim any of that damage a second time from the other of the wrongdoers: *Bird* v. *Randall* (16); *Morris* v. *Robinson*, *per* Bayley, J. (17); *United Australia Ld.* v. *Barclays Bank Ld.*, *per* Lord Simon (18). He cannot obtain double satisfaction. Where the judgment which is satisfied is that of a court of competent jurisdiction in this country and is in respect of the same damage although resulting from different wrongs, the old courts of equity, and now the High Court, exercising its equitable jurisdiction, would interfere to prevent such double satisfaction.

If, however, the court giving the judgment which is satisfied is a foreign one, the matter is not so clear. If a plaintiff has brought proceedings in a foreign court against a defendant for damages in respect of a cause of action and obtains a judgment, and that judgment is satisfied, it appears on the authorities that he cannot proceed in respect of the same debt or of damages based on the same cause of action against the same defendant in the courts of this country: *Barber* v. *Lamb* (19) and *Taylor* v. *Hollard* (20). In *Barber* v. *Lamb* (21) Erle, C.J., states the principle as being that the plaintiff has obtained the judgment of a tribunal to which he has resorted for enforcing his debt and that the judgment so obtained has been satisfied by payment of the sum awarded. Keating, J., there said (22): "But the

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(16) 3 Burr. 1345.
(17) 3 B. & C. 196, 205.
(18) [1941] A. C. 1, 21.
(19) 8 C. B. (N.S.) 95.
(20) [1902] 1 K. B. 676.
(21) 8 C. B. (N.S.) 95, 100.
(22) Ibid. 101.

"ground is, that there has been a judgment of a court having "jurisdiction over the subject-matter, and that that judgment "has been satisfied by payment". In *Taylor* v. *Hollard* (23) Jelf, J., said: "I think [the plaintiff] had elected to take the "judgment of the foreign country to which he had appealed in "discharge of the whole cause of action, and could not afterwards sue for the residue of the debt in England", and he quoted from *Barber* v. *Lamb* (24), where Erle, C.J., said: "It "would be contrary to all principle for the party who has chosen "such tribunal, and got what was awarded, to seek a better judgment in respect of the same matter from another tribunal".

Both these cases were actions between the same parties for the same debt based upon the same cause of action. The question I have to consider is whether, where there are separate causes of action against different defendants for the same damage, a judgment obtained against one of them in a foreign court which has been satisfied is a bar to proceedings against the other for the same damnum in the courts of this country. If I were satisfied that the amount recovered in this case by the plaintiff from the lorry driver was sufficient to compensate her for the damage which she has suffered, the principle in *Bird* v. *Randall* (25) against double satisfaction would apply and the plaintiff's claim would be dismissed.

But if, as is the case, I am satisfied that the amount recovered by the plaintiff is not sufficient to compensate her for the damage from personal injuries which she has suffered, am I bound by the decision of the French court as to the assessment of the damages? There is no direct authority so far as I am aware, and so far as counsel could find, upon this question. The decisions in *Barber* v. *Lamb* (26) and *Taylor* v. *Hollard* (27) both seem to rest upon the principle that the plaintiff, having elected the tribunal to decide the claim against the defendant and obtained judgment from that tribunal and satisfaction of that judgment, is bound by his election of the tribunal to decide the issue between the parties. When, however, there are two causes of action against separate defendants, although resulting in the same damage, the question arises whether there is anything to prevent the injured person choosing one tribunal to decide his claim against one defendant and another tribunal to decide his claim against the other defendant.

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(23) [1902] 1 K. B. 676, 681.

(24) 29 L. J. (C. P.) 234, 236; 8 C. B. (N.S.) 95.

(25) 3 Burr. 1345.

(26) 8 C. B. (N.S.) 95.

(27) [1902] 1 K. B. 676.

The present plaintiff, not unnaturally, brought her claim in France against the lorry driver and his employers, in which country they resided and where their assets were, and she brought her claim against the present defendant in this country where he resided and where no doubt his assets are. In my view, there is nothing in principle which prevents her adopting this course, and her election of one tribunal to deal with her claim against the lorry driver and his employers, even when she obtains judgment which is satisfied, will not avail the present defendant except to the extent that her damages have been in part satisfied by the money recovered from the lorry driver and his employers. This last statement is made on the assumption that I am not bound by the French court's assessment of damages and not bound to treat that assessment as correct. The principles upon which damages are assessed differ in different countries, but in assessing damages I must apply the law and practice of these courts.

When the French courts assess damages in a claim grafted on to penal proceedings for causing personal injuries by negligence, I am satisfied on the evidence that the claimant cannot recover for damage to property; for example, the claim by the plaintiff for the loss of her wrist watch could not be recovered in those proceedings, and this is conceded by the defendants. As a claim can subsequently be made for aggravation of injuries, the risk of such aggravation presumably is not taken into account in assessing the damages, whereas in this country damages are assessed once and for all. In the French courts, according to the evidence, the general damages vary according to the social position of the injured person; the better the social position the higher the general damages, and that, of course, apart from loss of earning capacity. In my view it may well be, and in this case I think it is, that the award of a French court is less than what would be regarded here as full satisfaction of the plaintiff's claim for the injuries and loss sustained. I am of opinion that I am not bound by the assessment by the French court of the damages in the plaintiff's claim against the lorry driver and his employers in assessing the damages in the plaintiff's claim against the present defendant.

Although the point was not argued before him, Birkett, J., refused to stay these proceedings in an appeal before him in chambers, on the plaintiff's undertaking to give credit to the defendant for any damages she might obtain against the lorry driver. I am not called upon to decide the question whether in these proceedings the plaintiff must give credit for the damages she has received from the lorry driver and his employers, as she has always been ready to give such credit. If I had to decide it, I should have thought that as her damages had been pro tanto satisfied by what she had already received, her damages must be reduced by that amount in her claim against the present defendant.

I have now to consider the question of damages. [His Lordship then considered the damages suffered by the plaintiff as a result of the collision, applying ordinary principles of English law, and continued:—] Taking all these matters into account, including special damages of 513*l.* (which includes damages for the loss of her wrist watch and the damage to her dress), the plaintiff is entitled, in my view, to the sum of 2,263*l.* as damages for the injuries and loss which she has sustained. From this will be deducted the sum of 1,428*l.* recovered from the lorry driver and his employers, and there will be judgment for the plaintiff for 835*l.*

Judgment for plaintiff.

Solicitors: *Amery-Parkes & Co.; Barlow, Lyde & Gilbert.*

R. P. C.

1951
July 24.

PARKINSON AND OTHERS v. AXON.

Lord Goddard, C.J., Hilbery and Ormerod, JJ.

Road Traffic—Goods vehicles—Excessive period of driving—Driver handling parcels as a sorter after driving—Not time spent on "work in connexion with a vehicle"—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 19.

A driver drove a goods vehicle collecting parcels from 2 p.m. until 6.30 p.m., and, after completing and handing in certain documents, continued to work at the vehicle depôt until 8.30 p.m. assisting in the sorting of parcels. That work involved the handling of parcels forming part of the loads of various vehicles, but not unless purely coincidentally the load of the vehicle which he had been driving. The driver was convicted of driving for a continuous period of more than five and a half hours contrary to s. 19, sub-s. 1 (*c*) (i), of the Road Traffic Act, 1930.

Held, on appeal, that the time spent on the work of sorting was not "time spent by a driver on other work in connexion with "a vehicle or the load carried thereby" within the meaning of sub-s. 2 of s. 19, for the defendant was not then acting as a driver at all but as a sorter of parcels, and that he could not therefore properly be convicted of an offence against s. 19, sub-s. 1 (*c*) (i).

CASE STATED by Lancaster justices.

Informations were preferred against a motor driver employed by the Road Haulage Executive and operating from their depôt at White City, Manchester, and against the Road Haulage Executive Manchester Parcels Group, charging him with driving certain motor vehicles constructed to carry goods other than the effects of passengers for a period of more than five and one half hours, and charging them with unlawfully permitting him so to do, contrary to s. 19 of the Road Traffic Act, 1930 (1).

The following facts were proved or admitted before the justices:—The driver was engaged in driving certain goods motor vehicles on the collection of parcels from shops and other premises in and around the city of Manchester from 2 p.m. until not later than 6.30 p.m. on each of the relevant days, and afterwards, having put his vehicle in its appropriate place at White City Depôt, he spent not more than fifteen minutes in completing and handing in the appropriate documents in respect of it and was free to leave the depôt for the day.

On each of the relevant days, however, the driver, shortly after handing in those documents, continued to work at the depôt "on the deck" until 8.30 p.m. with the knowledge and permission of the Road Haulage Executive, taking such part as he was called on to do by the foreman of that department. Such work involved the handling of parcels forming part of the loads of various vehicles, but not unless purely coincidentally the load of the vehicle which he had been driving, and involved no actual driving at all, shunt drivers being provided for any incidental driving. It was the practice at the depôt, owing to the difficulty of obtaining casual labour, to permit and indeed to invite such drivers who so wished to augment their wages so to assist the staff of porters and sorters normally engaged there during the busy period up to 8.30 p.m.

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(1) Road Traffic Act, 1930, s. 19, sub-s. 1: "With a view to protecting "the public against the risks which "arise in cases where the drivers of "motor vehicles are suffering from ex"cessive fatigue, it is hereby enacted "that it shall not be lawful in the "case of . . . (c) any motor vehicle "constructed to carry goods other "than the effects of passengers; for "any person to drive or cause or per"mit any person employed by him or "subject to his orders to drive— "(i) for any continuous period of more "than five hours and one half . . .".

Sub-s. 2: "For the purposes of this "section . . . (b) any time spent by "a driver on other work in connexion "with a vehicle or the load carried "thereby, including in the case of a "public service vehicle any time spent "on a vehicle while on a journey in "any other capacity than as a pas"senger shall be reckoned as time "spent in driving".

For the prosecutor it was contended that the time spent in so working "on the deck" was "time spent by a driver on other "work in connexion with a vehicle or the load carried thereby" within the meaning of sub-s. 2 of s. 19 of the Road Traffic Act, 1930, and should be reckoned as time spent in driving.

For defendants it was contended that having regard to the terms of s. 19 as a whole such time should not be so reckoned, the driver having already completed all actual driving for the day and being employed as a sorter, and the work being unconnected, except coincidentally, with any vehicle which he had been driving during the day.

The justices were of opinion that the prosecutor's contention was correct, and that the words in sub-s. 2 of s. 19, "any time "spent by a driver on other work in connexion with a vehicle or "the load carried thereby", seemed clearly to indicate that such words were not confined to the particular vehicle that the defendant had been driving. It seemed to them that had the employer defendants allowed to the driver half-an-hour's rest before he commenced his work "on the deck" the section would not have been infringed. They were also of opinion that the continuous working from 2 p.m. till 8.30 p.m. would, over a prolonged period, result in the driver being likely to suffer from excessive fatigue, the prevention of which was aimed at in sub-s. 1 of s. 19. Accordingly they convicted both the defendants on each of the informations.

The defendants appealed.

T. M. Backhouse for the defendants. The driver was not driving for a continuous period of more than five and a half hours within the meaning of s. 19 of the Act of 1930 on any of the days in question. Nothing which he did after he put his vehicle away for the night was relevant. Sub-s. 2 applies only where the journey on which the driver is driving is interrupted, e.g., for delivery of parcels. Once the vehicle was put away for the night the driver was no longer a driver within the meaning of the section: he was re-employed as a sorter.

R. J. Parker for the prosecutor. Sub-s. 2 of s. 19 is relied on. It applies to any work "in connexion with a vehicle". "A "vehicle" means "any vehicle", not "his vehicle". The indefinite article was used deliberately. Any other construction would lead to fantastic results. If two vans were together carrying furniture the section could be evaded by each driver working only on the loading or discharge of the other van, if the work must be done in connexion with the vehicle of the driver who is charged.

LORD GODDARD, C.J. [after stating the facts]. It was said that the driver was working until 8.30 p.m. " in connexion with " a vehicle or the load carried thereby ". When one has to construe any statute it is as well to bear in mind the words of Lindley, M.R., in *Thomson* v. *Lord Clanmorris* (2), that " regard " must be had not only to the words used, but to the history of " the Act, and the reasons which led to its being passed ".

The reasons which led to s. 19 of the Road Traffic Act, 1930, being passed are indeed shown by the unusual preamble. I say " unusual preamble " because one does not as a rule nowadays find preambles to a section. The preamble to this section shows that the object of the limitation of time is to protect the public against risks where drivers are suffering from excessive fatigue. In other words, if men are out on the road having to drive their vehicles for a great number of hours there is a danger in their driving because they may fall asleep or may not have the quick reaction which a driver should possess.

Therefore it seems to me that the object of sub-s. 1 (*c*) (i) is that the driver of a goods vehicle should not be on the road for a continuous period of more than five and a half hours. Parliament had, I think, to consider the case where a driver was out with a load and was spending his day not only in driving the vehicle but in delivering goods. They put in the provision in sub-s. 2 so that when the driver was out, say, for seven hours, it should not be open to him or his employer to say: " I have been " only five and a half hours driving; the rest of the time I was " delivering goods ". I think that there is no provision in the Act which says that a driver must not do any work other than driving, or must take a rest. He must have an opportunity for rest, but there is nothing to provide that he must rest in the sense that he must sit down or go to bed or something of that sort. He can employ himself in any work that he likes except, it is said, that it must not be anything to do with the load of a vehicle. That is not the way in which I read this section.

What the driver in the present case was doing was acting as a sorter of parcels. He was not acting as a driver at all. I think that sub-s. 2 of s. 19 is designed to include as time spent in driving time spent by a driver doing work on his vehicle on the road in the case of breakdown, or something of that sort, and it deals with the case of the work that he does in connexion with the load carried by his vehicle.

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(2) [1900] 1 Ch. 718, 725.

It is true that the defendant is a driver of vehicles, but I do not construe the words of s. 19 as saying that, although a driver may engage in any other particular form of work or activity which he likes after he has driven, he commits an offence if the work which he does is connected in some way with parcels that are going by road. Apparently he could sort them if they were going by rail. He could go to the railway station and sort them, but he must not sort them if they happen to be going by lorry. I think that that is putting a construction on s. 19 which its preamble does not require me to put on it and which I do not think that Parliament has intended should be put on it.

HILBERY, J. I agree.

ORMEROD, J. I agree.

Appeal allowed.

Solicitors: *M. H. B. Gilmour; Treasury Solicitor.*

R. P. C.

1951
July 18.

LINES *v.* HERSOM.

Lord Goddard, C.J., Hilbery and Ormerod, JJ.

Road Traffic—Use of motor vehicle on road by disqualified driver—Prima facie sentence of imprisonment—"Special circumstances of "the case" justifying lighter sentence—Construction—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 7, *sub-s.* 4.

The "special circumstances of the case" which, under s. 7, sub-s. 4, of the Road Traffic Act, 1930, justify a court in substituting a fine for a sentence of imprisonment in the case of the conviction of a disqualified person for driving a motor vehicle on a road, must, like the "special reasons" in ss. 11, 15, 35, which justify the court in refraining from endorsing a licence or disqualifying a person from applying for, or holding, a licence, be of a special, as opposed to a general, character and must relate to the offence and not to the offender.

Whittall v. *Kirby* [1947] K. B. 194 applied.

CASE stated by Hertford quarter sessions.

On October 12, 1950, the defendant, Charles Hersom, was convicted before the court of summary jurisdiction sitting at Watford on charges (a) of unlawfully using a motor van on June 20, 1950, on a certain road without there being in force in relation to the use of the vehicle such a policy of insurance, or such a security in respect of third party risks, as complied with the requirements of Pt. II of the Road Traffic Act, 1930, contrary to s. 35 of the Act, and (b) that then being disqualified under Pt. I of the Road Traffic Act, 1930, for holding or obtaining a driving licence, of driving the motor van on the road contrary to s. 7 of the Act (1).

The defendant was sentenced to one month's imprisonment for each offence, the sentences to run concurrently, and in respect of the first offence charged, was further disqualified for holding or obtaining a driving licence for twelve months. The defendant appealed to quarter sessions and on the hearing of the appeal the following facts were proved or admitted:—On March 28, 1950, the defendant (then the appellant) was convicted of using a motor vehicle while uninsured and was disqualified for holding or obtaining a driving licence for twelve months. On June 20, 1950, at 11.30 p.m., the defendant was driving a motor van at High Street, Bushey. He had bought the van on the day in question for reconditioning and resale and had not driven it except on the occasion of his offence on that day, and had not driven any other vehicle since the date of his disqualification. On the occasion of his offence the defendant had missed his last train home, which was the explanation of his driving the van. When called on by a police officer to do so, the defendant was unable to produce a certificate of insurance in respect of the van or a driving licence or identity card, and falsely gave as his name the name of his brother-in-law, one Chodick.

On June 22, 1950, at Wembley Police Station, Chodick produced a certificate of insurance which did not cover the defendant's motor van, together with a driving licence and identity card in his (Chodick's) name. On October 6 the defendant was convicted and fined for allowing a certificate of insurance and a driving licence to be used by another person, with intent to deceive. For each of the above offences the defendant was fined 10*l.* and ordered to pay 1*l.* in costs, and in respect of the first offence was disqualified for holding or obtaining a driving licence for twelve months. At the same time and place Chodick was convicted of two similar offences in respect of the aforesaid transactions, and was fined 10*l.* for each offence and ordered to pay 1*l.* 1*s.* in costs. The defendant paid a sum of 44*l.* 4*s.* in respect of the fines and costs ordered to be paid by Chodick and himself.

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(1) Road Traffic Act, 1930, s. 7, sub-s. 4: "If any person who under "the provisions of this Part of this "Act is disqualified for holding or "obtaining a licence applies for or "obtains a licence while so disqualified, or if any such person "while he is so disqualified drives a "motor vehicle . . . on a road, that "person shall be liable on summary "conviction to imprisonment for a "term not exceeding six months, or "if the court think that, having "regard to the special circumstances "of the case, a fine would be an "adequate punishment for the offence, "to a fine not exceeding 50*l*., or to "both such imprisonment and such "fine, and a licence by any person "disqualified as aforesaid shall be of "no effect".

Apart from the matters set out above, the defendant, who was thirty-seven years of age, was a man of perfectly good character. From 1940 to 1944 he served in the army and was seriously wounded in action. He was demobilized suffering from a duodenal ulcer and a weak heart, and was discharged with an exemplary character. He was now a registered disabled person in receipt of a 60 per cent. disability pension and was therefore more than ordinarily dependent on mechanical transport. He was in business on his own account and, if he were unable to attend to it, the business he had built up would come to an end.

It was contended for the defendant that the above facts were such that, having regard to the special circumstances of the case, a fine would be an adequate punishment for the second offence of which the defendant had been convicted.

Quarter sessions were of opinion that in the circumstances of the case a fine would be an adequate punishment. They therefore allowed the appeal, varying the sentences of imprisonment to a total fine of 15*l.* to be paid within one month from November 14, 1950, subject to one month's imprisonment in default of payment. At the instance of the prosecutor they stated a case with regard only to the second offence of which the defendant was convicted, the question for the court being, whether, in the circumstances, quarter sessions were justified in substituting a fine for the sentence of imprisonment.

F. H. Lawton for the prosecutor. Quarter sessions were wrong in holding that the special circumstances of the case justified them in altering the sentence of imprisonment on the defendant to a fine. The question depends on whether the "special circumstances" referred to in s. 7 of the Road Traffic Act, 1930, means anything different from the "special reasons" in ss. 11, 15 and 35. It is submitted that the meaning of the words is the same and that the decision in *Whittall* v. *Kirby* (2) that the reasons must be special to the offence and not to the offender equally apply when the court is considering the special circumstances of the case. In the present instance, all the matters relied on by quarter sessions were circumstances special to the defendant and therefore afforded no justification for saying that they were special circumstances of the case which justified the substitution of a fine for a sentence of imprisonment.

Frank Milton for the defendant. Quarter sessions were right in the decision at which they arrived. The " special reasons " in ss. 11, 15 and 35 of the Road Traffic Act, 1930, are not the same as the " special circumstances " in s. 7. The former sections say that a person " shall be disqualified " unless there are special reasons. The words there are mandatory while in s. 7 they are that the offender " shall be liable " to imprisonment. It is submitted that the words " special circumstances of the " case " are persuasive rather than mandatory.

Further, " circumstances " is a much wider word than " reasons " and s. 7 gives a discretion to the court to take into consideration all the circumstances, which include those in relation to the offender as well as those in relation to the offence. Among special circumstances may be included any compassionate matter in relation to the offender which the court has said must not be taken into account in considering whether there are special reasons for not endorsing a licence or refraining from disqualifying a person from holding one. For instance, it is submitted that special circumstances might include the fact that a person would lose his livelihood as the result of a sentence of imprisonment, or that he was a person disabled by war injuries, which would be excluded when the question of " special reasons " under the other sections of the Act were being considered. The matters relied on by quarter sessions were relevant for their consideration, and their decision was, therefore, right.

LORD GODDARD, C.J. [after referring to the facts:] Section 7, sub-s. 4, of the Road Traffic Act, 1930, has a marginal note which reads: " Provisions as to disqualifications and suspensions ". [His Lordship read the sub-section and continued:] The first thing to be observed is this: the section says that a person shall be liable on summary conviction to a term of imprisonment not exceeding six months. I do not think that there is any particular importance to be attached to the fact that it says "shall be liable "to imprisonment for six months", because that is the expression that is commonly used in criminal statutes, and it indicates the penalty which the person charged is to receive. It is very common to find in all classes of statutes which impose penalties an alternative penalty of a fine. As an example of this one need only look as far as s. 8, sub-s. 4, of this statute, where one finds that if a person, when he is applying for a licence, does not disclose the fact that his previous licence has been endorsed he shall be liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding 50*l*. In that case, of course, the legislature is giving magistrates a complete discretion whether they will impose imprisonment or a fine; but, as we said in *Whittall* v. *Kirby* (3), which was concerned with the question of the disqualification of a driver, and what would constitute special reasons for refraining from disqualifying, the very fact that the words "special reasons" are used shows that Parliament intended to limit the discretion of magistrates and that they had not, therefore, an unfettered discretion to refrain from sending an offender to prison under s. 7 or to disqualify him under the other later sections in the Act. They can only exercise the discretion if there are "special reasons" or "special circum-"stances" which will entitle them so to do. Prima facie, the punishment for the offence in this case is imprisonment. For dangerous driving, or driving uninsured, or driving when drunk, there is prima facie to be a disqualification, and magistrates must remember that the discretion that is given to them is not an unfettered discretion, for the words of the relevant sections limit the discretion.

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(2) [1947] K. B. 194.

Mr. Milton called attention to the fact that the words used in s. 7, sub-s. 4, are not quite the same as those used in the later sections in the Act. In my opinion there is no difference in substance between them. A statute, as we know, has to pass through committee in both Houses of Parliament and amendments are moved from time to time, and it is quite possible to find that an amendment which is moved to an early section in the statute may be worded in one way, while an amendment which is moved to a later section having exactly the same idea is worded in another way; but it does not at all follow that the legislature intends something different because the language of the two sections is not exactly the same.

(3) [1947] K. B. 194.

On this point Blackburn, J., that very great authority, said in *Hadley* v. *Perks* (4): "It has been a general rule for drawing "deeds and other legal documents from the earliest times, which "one is taught when one first becomes a pupil to a conveyancer, "never to change the form of words unless you are going to "change the meaning, and it would be as well if those who are "engaged in the preparation of Acts of Parliament would bear "in mind that that is the real principle of construction. But in "drawing Acts of Parliament, the legislature, as it would seem, "to improve the graces of the style, and to avoid using the same "words over and over again, constantly change them". He pointed out in that particular case that although the words in one section in some respects differed from the words in a later section, the construction to be put upon them was the same and Parliament merely changed the language without changing the meaning. Speaking for myself, I can find no different meaning to be attached to the words "special circumstances of the case" which appear in s. 7 from that to be attached to the words "special "reasons" which are to be found, for instance, in s. 15, which relates to driving when under the influence of drink; in s. 11, which is concerned with dangerous driving; and in s. 35, with regard to driving when uninsured.

When the court had to consider for the first time the question what reasons under s. 11 would justify magistrates from refraining to endorse a licence, in an endeavour to make clear to magistrates what they must find, we used an expression or formula which was the best that we could think of, and one which had, in fact, been used by me in an address which I gave to a grand jury at Chelmsford in 1937 and which was subsequently adopted by the court in Northern Ireland as the best way in which it could be put. The formula in question was that the reasons must be special to the case and not to the offender. I know that in many cases it is difficult to keep a sharp distinction between the case and the offender, but what we meant was that matters which might be pleaded as mitigation, that is to say, such things as the defendant's previous good character or the particular hardship he would suffer, or something of that kind, were matters which were irrelevant and ought to be left out of account.

In the present case, the words of the section "having regard "to the special circumstances of the case", emphasize that for the purpose of s. 7 the circumstances must be special to the case.

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(4) (1866) L. R. 1 Q. B. 444, 457.

I will not say that the conditions relating to the offender are to be left out altogether, because that is almost impossible, but it is the circumstances which are special to the case which are to be the primary consideration.

We also pointed out in *Whittall* v. *Kirby* (5), and I desire to re-emphasize it, that, where Parliament says that the circumstances are to be " special ", it is obviously contrasting circumstances that are special with circumstances that are general. For instance, it is well known that, in cases relating to disqualification and endorsement, before *Whittall* v. *Kirby* (5) magistrates used to be asked to refrain from endorsing or disqualifying because the defendant had been driving for a great number of years without complaint; in other words, that he was a first offender. We pointed out that that could not possibly be a special reason: it was a circumstance of the most general application, for even now, I believe, although motoring cases are numerous in the courts, the majority of motorists appearing in them have not been previously convicted. Another reason was that it would have been perfectly easy for Parliament to refer to the question of previous conviction in the Act if it desired to do so. In fact in the earlier Motor Car Act it was provided that in regard to certain offences a driver should not have his licence endorsed for exceeding the speed limit unless he had been twice previously convicted. It was only on the third occasion that the licence had to be endorsed under that Act; but in the subsequent Act Parliament provided that the licence could be endorsed for a first offence.

All these considerations lead me to the clear opinion that the proper interpretation to be put upon s. 7, sub-s. 4, is that prima facie, for the very serious offence involved, the offender should be sent to prison. The offence of driving when disqualified is about as serious an offence as a motorist can commit, because it follows that if he injures someone that person will be unable to recover any compensation if the motorist cannot pay, because no insurance company will be liable. Parliament has said that prison is the proper penalty for the offence. That may be hard, and we have often pointed out that questions of disqualification often involve great hardship, but the question whether there is great hardship or whether the penalty is a severe one is not a matter for the court if Parliament has ordained it. Our duty is to apply the law which Parliament has laid down, and if Parliament has said

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(5) [1947] K. B. 194.

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that prima facie the penalty for this particular offence is to be imprisonment it is the duty of the courts to impose imprisonment unless, as provided in s. 7, sub-s. 4, there are special circumstances of such a kind as would justify them in passing a lighter sentence, that is to say, a fine instead of imprisonment.

The next thing to bear in mind is that, although we laid down general principles in *Whittall* v. *Kirby* (6) and one or two other cases which followed soon afterwards and have tried to make the matter as clear to magistrates as we can, we have always recognized that provided that there is evidence of facts which can amount to special circumstances or special reasons, then it is for the magistrates to say whether they will disqualify or, in this case, send to prison or not. The magistrates have, as we said, a limited discretion. If there are facts upon which they can exercise their discretion, this court will not interfere, though it may be that either all or some of the members of the court might not, if they had been trying the case, have seen fit to exercise the discretion in the same way as the magistrates.

If there are facts found by the magistrates which can amount to special circumstances, that is to say, circumstances which are special and not general and which can properly be taken into account as being special to the case, this court will not interfere.

Before referring to the facts of the present case, I think it may be worth while to make the following statement: magistrates very often forget that in the case of driving an uninsured vehicle the offence does not consist in the driver not being covered by a policy when an accident occurs. The legislation is to some extent preventive legislation and its object is to prevent people driving when they are uninsured. An uninsured man may very likely drive for many miles on many occasions without an accident, but the offence consists of the driver driving without a policy so that, if someone meets with an accident, the injured person will have no insurance company to look to. It is no mitigation of the offence of driving uninsured, and magistrates should clearly so understand, that during the drive, the driver has not met with an accident.

Having endeavoured, I hope with some clarity, to state the general principles that apply, I turn to the facts of this particular case which seem to me to be about as serious as could be brought before a court. If one had any comment to make on the sentence which was pronounced in the first court it would be that the magistrates at Watford, in sentencing the defendant to a month's imprisonment to run concurrently for each of these offences, certainly erred on the side of mercy and not of harshness.

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(6) [1947] K. B. 194.

In the present case the defendant had been disqualified on March 28, 1950, for the same offence of using a motor car while uninsured and he then escaped with a fine of *5l.* and was disqualified for holding a licence for twelve months. Under two months afterwards, on June 20, he is found driving a motor van. He bought the motor van for reconditioning and resale, and the magistrates found that that was the only occasion on which he had driven the van, and that he had not driven any other vehicle since the date of his disqualification. That is merely saying that he had only committed one offence and not three or four, but that was the position. If the defendant, while disqualified, wished to buy a van and take it to his garage for repair he should have got somebody to drive it for him. He was driving at half-past eleven at night, and on the occasion of this offence he had been working late "and had missed his last train home, and that "was the explanation for his driving the said van". I thought that the explanation was that he was driving it for the purpose of reconditioning it, but let us pass that by. If a person has been disqualified, is it the least excuse that he has allowed himself to miss the last bus or train? Disqualification is intended as part of the punishment and its object is to subject a disqualified person to inconvenience. That is one of the reasons why Parliament ordained disqualification as part of the punishment, to keep a dangerous person off the road. And the same thing applies in the case of a person uninsured: it is part of the punishment.

Having driven this car uninsured while disqualified, the defendant was called upon by a police officer at Watford to produce a certificate of insurance. He was unable to produce a driving licence because he had not one—he had forfeited it—or an identity card. Then he gave a false name, aggravating his offence in every conceivable way. He gave his name as Isidore Chodick, of 18 Sandhurst Road, Kingsbury, in other words the name and address of his brother-in-law. Then he conspired with his brother-in-law to defeat the ends of justice, because Chodick, at the defendant's request, went to Wembley police station and produced a certificate of insurance which did not cover him, together with a driving licence and identity card which belonged to Chodick. As I say, he and Chodick put their heads together to defeat the ends of justice. Fortunately that was found out and, on October 6, the defendant was convicted of the offence of producing this false certificate and of representing, or getting somebody to represent, that it was his certificate and licence, and Chodick was convicted too. So far that is satisfactory. For each offence he was fined 10*l.* and again disqualified for holding or obtaining a driving licence for a period of twelve months, and Chodick was convicted of the two offences and for each fined 10*l.*

The next finding in the case is a curious one, and I am not sure whether it was meant to be a special circumstance or not. It is said that the defendant paid a total sum of 44*l.* 4*s.* in respect of the fines and costs ordered to be paid by him and by the said Chodick. He may have paid Chodick's fine. I dare say, as he had landed his brother-in-law in this trouble, that it was just and reasonable that he should do so, but how does that constitute a special circumstance or mitigate the offence in any way? This man was guilty of every aggravation it is possible to conceive and he was very properly fined for the other offences he had committed.

Then there is the statement "that apart from the matters "hereinbefore set out the appellant, who is thirty-seven years of "age"—and therefore old enough to know better—"is a man "of perfectly good character". That a man who conspires to deceive the court by putting forward a false document with intent to deceive can be thought to be a man of good character seems to me to be a very curious finding. If they had said he had never been previously convicted that would have been another thing.

We then come to the matters which, I suppose, are said to be the real special circumstances: "That from 1940 to 1944 the "defendant served in the army, that he was seriously wounded "in action and that he was demobilized suffering from a duo"denal ulcer and a weak heart, with an exemplary character". How can it possibly be a circumstance in mitigation of driving a motor car when disqualified, that the man, like hundreds of thousands of other men, served in the army with a good character and was wounded? It is a matter of the most general description and cannot possibly be regarded as a special circumstance when considering this class of offence. It often happens that when one is dealing at assizes or quarter sessions with a man who is up on a charge of larceny that an appeal is made on the ground that the man got into difficulties and that after having served his country well and, owing to his wounds, he had not been able to follow his calling and had become short of money. That may be a very good matter to take into account, but how it can be said that a man with a duodenal ulcer who has served in the army can put that forward as a matter to be taken into account when charged with the offence of driving when disqualified, I confess I am unable to understand.

Then it was said that the defendant "is now a registered "disabled person in receipt of a 60 per cent. disability pension "and is therefore more than ordinarily dependent on mechanical "transport". Should he not have thought of that before he committed the offence of driving without an insurance policy? Does not it show that of all classes of people he is the man who ought to be insured, because if a man is a partly disabled person surely he is more likely to meet with an accident than others? Again that is a circumstance of the most general description.

It is further found that the defendant is in business on his own as a motor-body repairer and that if he were unable to attend to it the business which he has built up would come to an end. That is giving the go-by to everything the court said in *Whittall* v. *Kirby* (7), where we laid down that financial hardship was not a matter which the court was entitled to take into account, adding that, if that were thought to be a special reason people must go to Parliament and get it to alter the law. Parliament has not said that financial hardship or matters of that kind are to be taken into account. We have constantly given the illustration of the lorry driver or professional chauffeur who, of course, may suffer grievous hardship by being disqualified. It is a much greater hardship for such people, who earn their living by driving, to be disqualified than it is for a private motorist who may use his car principally for pleasure; but Parliament has not drawn the distinction and it is not, therefore, for the courts to do so. If Parliament has said that all people are to be disqualified for those offences it is not for the courts to say, "We will not disqualify "this particular man because we think it is a hardship, but we "might disqualify a man on whom there would not be the same "hardship". The finding in the case about the defendant's business is precisely one of the things which this court laid down in *Whittall* v. *Kirby* (7) ought not to be taken into account, and I desire to say, certainly for myself—my brethren will differ if they think fit—that no different considerations apply to the "special circumstances" of the case mentioned in s. 7, sub-s. 4, than to the "special reasons" mentioned in the other sections. It is only, in my view, a difference of expression such as

(7) [1947] K. B. 194.

Blackburn, J., called attention to in *Hadley* v. *Perks* (8), which I cited.

For these reasons I am of opinion that there were no circumstances found by quarter sessions which could be special circumstances in this case, and accordingly we answer the question submitted to us in the negative and direct that the sentences passed by the magistrates at Watford be restored. As, however, quarter sessions imposed a joint fine in respect of the two offences charged, they must say how much of the fine imposed related to the first offence in relation to which no case was stated.

HILBERY, J. I am of the same opinion. Not only do I not dissent from what my Lord has said to the effect that no different considerations apply in the case of " special circumstances " in s. 7, sub-s. 4, from those which apply to " special reasons " in the other sections, but I think that the case for saying that the special circumstances must relate to the offence and not to the offender is stronger under s. 7, sub-s. 4, than it is under the other sections where " special reasons " are mentioned.

In s. 7, sub-s. 4, the words are not only " special circumstances " but " special circumstances of the case ", and, in addition, those words occur in a sentence where it is said " or if " the court think that, having regard to the special circumstances " of the case, a fine would be an adequate punishment for the " offence ". I regard the last words of that sentence as being of some importance since they indicate that in s. 7, sub-s. 4, the statute is not contemplating the offender but essentially the offence, and the special circumstances which the court must find are to be circumstances of the case, disregarding any circumstances which are special to the offender.

ORMEROD, J. I agree, and have nothing to add.

Appeal allowed.

Solicitors: *The Solicitor, Metropolitan Police; Penman, Johnson & Ewins.*

P. B. D.

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(8) L. R. 1 Q. B. 457.

1951
June 21, 22;
July 9.

Lord Goddard, C.J., Hilbery and Devlin, JJ.

REX *v.* FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL. *Ex parte* MARKS.

Landlord and Tenant—Rent restriction—Rent tribunal—Furnished houses—House fully furnished and within Rent Restriction Acts—No power in tribunal to reduce rent below standard rent—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 7.

Where a dwelling-house to which the Rent Restriction Acts apply and which has a standard rent under those Acts is let, either partially or fully furnished, under a contract which also brings the premises within the Furnished Houses (Rent Control) Act, 1946, a rent tribunal acting under that Act has no jurisdiction to reduce the contractual rent of the premises below the standard rent, since to do so would "affect" the provisions of the Rent and Mortgage Interest Restriction Acts, 1920 to 1939, contrary to s. 7 of the Act of 1946.

Rex v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Bedrock Investments, Ld.* [1948] 2 K. B. 413, applied.

APPLICATION for an order of certiorari.

In 1938 the applicant, Rose Adela Marks, became the owner of a house, No. 20 Chepstow Villas, London, W., which was divided into flats separately let. The ground floor flat, which was the subject of the present application, was a separate dwelling to which the Rent and Mortgage Interest Restriction Acts, 1920 to 1939, applied, and had a standard rent, unfurnished, of 3*l.* 3*s.* a week, at which rent it was let from February, 1938, to February, 1940. In July, 1950, the applicant furnished the flat and let it to one D. G. Vallis and his wife, with the use of a bathroom and w.c., electric light and hot water, and with the benefit of the maintenance by the landlord of common parts of the premises, at a rent of 2*l.* 15*s.* a week.

On July 28, 1950, notice to quit the premises was given to the tenants. D. G. Vallis thereupon made an application to the respondents, Fulham, Hammersmith and Kensington Rent Tribunal, and on September 13, 1950, the tribunal made an order reducing the rent of the flat from 2*l.* 15*s.* to 1*l.* 5*s.* a week.

The landlord now applied for an order of certiorari to have brought up and quashed the order of the rent tribunal on the ground that they had no jurisdiction to make the order inasmuch as it reduced the rent of the premises below the standard rent and consequently "affected" provisions of the Rent Restriction Acts, 1920 to 1939, contrary to s. 7 of the Furnished Houses (Rent Control) Act, 1946 (1).

S. K. de Ferrars for the applicant. The tribunal had no jurisdiction to reduce the rent of the flat to a figure below that of the standard rent. It was decided in *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Bedrock Investments Ld.* (2) that where premises which came within the Rent Acts and which had a pre-1939 standard rent were let with a small amount of furniture or services which would bring them within the Furnished Houses (Rent Control) Act, 1946, a rent tribunal had no power to reduce the contractual rent below the standard rent, since to do so would "affect" provisions of the Rent and Mortgage Interest Restriction Acts, 1920 to 1939, contrary to s. 7 of the Act of 1946.

It is submitted that the same principle applies when, as in the present case, the premises are let fully furnished, since to reduce the contractual rent below the standard rent would "affect" the standard or ceiling rent under the Rent Acts, 1920 to 1939. Under s. 4 of the Act of 1946, when a new rent has been registered by the tribunal as the rent of the premises, it becomes illegal for a landlord to receive any rent in excess of the amount registered. That would prevent the landlord from receiving the standard rent and would thereby affect provisions of the Rent Acts. There is nothing in s. 4 which limits the meaning of the word "premises" to furnished premises, and the landlord cannot receive any rent in excess of the registered rent whether the premises are furnished or unfurnished.

J. P. Ashworth for the tribunal. The tribunal had jurisdiction to make their order. When the agreement was referred to them they clearly had power to do so since it was concerned with a furnished letting of the premises. They were not bound by the standard rent because the Rent Acts had no application to the premises when let furnished. In Megarry on the Rent Acts (6th ed.), p. 364, under the heading "Lettings also Controlled

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(1) Furnished Houses (Rent Control) Act, 1946, s. 7: "Sections 9 "and 10 of the Increase of Rent and "Mortgage Interest (Restrictions) "Act, 1940 (which relate respectively "to limitation on rent of houses let "furnished and to penalty for excessive charges for furnished lettings), shall not apply as regards "the rent charged for any house or "part of a house entered in the "register in respect of any period "subsequent to such registration, but "save as aforesaid nothing in this "Act shall affect any provisions of "the Rent and Mortgage Interest "Restriction Acts, 1920 to 1939".

(2) [1948] 2 K. B. 413.

"by the Rent Acts", it is stated that: "When the services and "furniture are sufficient to attract jurisdiction under the Act of "1946 but insufficient to exclude the Rent Acts, so that the "letting is governed by both sets of statutory provisions (see the "*Bedrock* case) (and not otherwise it seems) a tribunal cannot "reduce the rent below the rent recoverable under the Rent "Acts". The whole purpose of the Act of 1946 was to cover contracts for furnished lettings, and the reduction of the furnished contractual rent could not affect the standard rent.

Registration of the rent under s. 4 of the Act of 1946 could not provide a ceiling for the particular physical premises concerned for all time; for example, the registered rent could not affect the premises if they were let for a purpose which took them out of the operation of both the Rent Acts and the Act of 1946. Although the latter does not say so in terms, its plain meaning is that it concerns premises let furnished and only applies to such premises. It is true that s. 4 refers to "premises" without qualification, but it is submitted that that means furnished premises. If that is so, the Rent Acts were not "affected" within the meaning of s. 7 and certiorari should not issue.

Cur. adv. vult.

July 9. The following judgments were read:—

HILBERY, J. [after stating the facts]. It was contended for the applicant that as there was, as was conceded, under the Rent and Mortgage Interest Restriction Acts, 1920 to 1939, a standard rent of the premises in question at the date of the application by D. G. Vallis to the rent tribunal, the tribunal had no jurisdiction to reduce the rent of the premises furnished below that standard rent, and that the case was covered by the decision of the Court of Appeal in *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Bedrock Investments Ld.* (3).

For the tribunal it was contended that their decision only decided the rent of the premises as furnished premises and therefore did not affect any provision of the Rent Restriction Acts, 1920 to 1939, and so was not a decision which the tribunal were precluded from giving by reason of s. 7 of the Act of 1946.

In my view this case is covered both by the decision in the *Bedrock* case (3) and on principle. The headnote to the report

(3) [1948] 2 K. B. 413.

of that case in the Law Reports correctly states what was the precise decision, namely, that " where a dwelling-house to which " the Rent Restriction Acts apply is let under a contract which " also brings the premises within the Furnished Houses (Rent " Control) Act, 1946, a rent tribunal under that Act has no jurisdiction to reduce the rent of the premises below the standard " rent, since to do so would ' affect ' provisions of the Rent and " Mortgage Interest Restrictions Acts, 1920 to 1939, contrary to " the provisions contained in s. 7 of the Furnished Houses (Rent " Control) Act, 1946 ".

In giving that decision, however, the members of the Court of Appeal summarized their views of the situation which arises when a rent tribunal sitting under the Act of 1946 purports to reduce the registered rent of premises which are within that Act to a level below the standard rent.

The passage in question (4) is as follows: " In our judgment " the question involved does in fact depend on the true construction of s. 7 of the Act of 1946; and in particular on the meaning " which is to be attributed to the word ' affects ' as it appears " in the section. As to this, it is to be borne in mind that " complicated and in some ways intricate machinery had been " devised through the medium of the Acts of 1920 to 1939 for " the purpose of protecting tenants from the actual or potential " avarice of landlords. Security from dispossession had also to " be achieved, but with this we are not immediately concerned. " The legislative provisions which are relevant for the present " purposes are those which were evolved over a considerable " period by a process of trial and error, with the object of imposing " a ' ceiling ' upon the rent which a landlord could legitimately " require his tenants to pay for the occupation of premises that " came within the Acts. In our judgment those provisions are " included amongst the provisions which are to remain unaffected " by the Act of 1946. Mr. Paul argued that some of those provisions are not only affected but are overruled if the tribunals " set up under the Act of 1946 purport to reduce the contractual " or registered rent of the premises which are within the Act to " a level below the standard rent ".

In the concluding passage of that judgment (5) the court further pronounced on this subject in the following terms: " All " these considerations can lead only to the conclusion that a reduction by a tribunal of a contractual rent to a level below that

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(4) [1948] 2 K. B. 413, 419.

(5) Ibid. 419.

"of the standard rent does affect the provisions of the Rent "Restriction Acts, namely, the provisions under which the "standard rent is determined and, if need be, apportioned and "under which it may, in certain circumstances, be increased. "Those provisions are 'affected' in the sense that they would "be disturbed, and even overridden, if the appellants are right. "If their argument is sound the simple decision of the rent "tribunals could substitute a lower 'ceiling' of rent for the "'standard' rent permitted by the Rent Restriction Acts. The "latter, as we have already said, is the subject of careful and "elaborate legislation which, although drastically restrictive of "landlords' rights, is not unmindful of them altogether, and "the standard rent, with the permitted increases, presumably "represents the return which the legislature regarded, and still "regards, as proper for a landlord of controlled premises to "receive. We cannot but think that if Parliament had intended "by the Act of 1946 to authorize the tribunals set up thereunder, "in their discretion and by their unappealable decision, to reduce "the standard rent and to override the permitted increases they "would have expressed that intention in clear and definite terms; "and it is to be supposed that they would, moreover, have pro-"vided that one member at least of each tribunal should be a "person having legal qualifications. We are, however, satisfied "that the language of s. 7 of the Act sufficiently shows that such "was not the intention of the legislature; which was, on the "contrary, that the Act should be supplementary to, but (except "as to ss. 9 and 10 of the Act of 1920) in no way destructive of, "the Rent Restriction Acts of 1920 to 1939".

It is said that those passages were not necessary to the decision of that particular case, and it is true that the premises in question in that case came both within the Act of 1946 and the Rent Restriction Acts. Although the passages which I have quoted may therefore be said to go beyond the narrower point which was being decided, they are obviously intended as a considered declaration and authoritative statement by that court for the guidance of rent tribunals sitting under the Act of 1946. In the present case, when the rent tribunal decided to register a rent for the premises in question below the standard rent of those premises, they were doing that which the Court of Appeal had declared that they could not lawfully do: they were introducing a new prohibition which was an interference with the control set up by the Rent Acts and therefore affected the provisions of those Acts.

Apart from this authority, the contention of the tribunal that the rent fixed by them and entered on the register is only of those premises as furnished premises and therefore does not offend against s. 7 as affecting any provisions of the Rent Restriction Acts, 1920 to 1939, appears to me to be also answered in principle. By s. 4 of the Act of 1946 it is the rent payable for " the premises " which is entered in the register kept under the provisions of the Act, and by s. 9 a person who requires or receives any payment or any consideration in contravention of s. 4 is made guilty of an offence and liable on summary conviction to fine or imprisonment or both. Section 4 is therefore a penal section and must be construed strictly. It certainly does not contain any express words qualifying the word " premises " by any such word as " furnished ".

It is to be noticed in considering whether the intention of the Act is that the rent fixed by the tribunal shall attach in rem to the premises, as opposed to merely altering the rent payable under the contract for the furnished letting particulars of which have to be entered in the register, that by s. 2 the local authority as well as either party to the contract may refer the contract to the tribunal for the district.

It has been decided that the standard rent under the Rent Restriction Acts attaches to the premises in rem, and if, as it would seem, the rent fixed and registered by a tribunal sitting under the Act of 1946 also attaches to the premises in rem, then, when such a tribunal registers a rent lower than the standard rent, it is necessarily doing something which affects the provisions of the Rent and Mortgage Interest Restriction Acts, 1920 to 1939, which it has no power to do. It was said that this conclusion cannot be right because, if it were, the premises could not, where a rent tribunal under the Act of 1946 had fixed and registered a rent, be thereafter let for business purposes at other than the rent thus fixed. The fallacy in this contention lies in the fact that if it were right, it would be equally an objection to saying that the standard rent under the Rent Restriction Acts could not be said to attach to the premises in rem. But the courts have said that it does, and the fact is that a letting of the premises as business premises makes a difference in the res to which the standard rent or a rent fixed and registered under the Act of 1946 applies. The order sought must issue, and the record be brought up to be quashed.

DEVLIN, J. [read by Lord Goddard, C.J.]. I agree that this application should succeed. The question is the same as that which was determined in *Rex* v. *Paddington and St. Marylebone Rent Tribunal; Ex parte Bedrock Investments Ld.* (6), namely: "Does an order of a tribunal under the Act of 1946 reducing the "contractual or registered rent below the standard rent of a "dwelling-house affect any provision of any Rent Restriction "Acts?" The answer turns upon the meaning to be given to the word "affect".

In the *Bedrock* case (6) the court was considering a partly furnished flat, if I may use that term as a convenient label to describe a flat in which a part of the rent, not amounting to a substantial portion, is attributable to the use of furniture or to attendance. One of the examples examined in the case was a flat in this category which had a standard rent of 70*l.* and a rent determined under the Act of 1946 of 50*l.* The Rent Acts are, in effect, saying in relation to that flat: "You may not charge more "than 70*l.*"; and the Act of 1946 is saying: "You may not "charge more than 50*l.*". If the Rent Acts by implication said, "You may charge as much as 70*l.*", the Act of 1946 would clearly be affecting its provisions; for it would be taking away from the landlord a right granted to him by the Rent Acts. But in the view of the Court of Appeal the Rent Acts did not, on their proper construction, imply the grant of any such right. Accordingly it was necessary for the court, if the landlord was to succeed, to give a wider meaning to the word "affect".

There is nothing logically abhorrent in the idea of a double prohibition. The party who is subject to it is caught by whichever limit is the lower. The later Act which imposes the lower figure does not clash directly with the earlier Act. It cannot even be said, in the case of these Acts, that the higher prohibition is rendered otiose; for there is provision in each Act for altering the figures, and their relation to each other is not therefore constant. In effecting the prohibition, it might be that at one time one statute was operative and at another the other statute.

There was therefore in the *Bedrock* case (6) no direct clash and no absolute incompatibility between the two Acts. The Court of Appeal in its judgment uses the words "overrule" and "override" in contexts which show that they are intended a fortiori. The "affection" which the Court of Appeal found to exist was something less than that. I think it may fairly be summarized as an interference with the scheme of control set up by the Rent Acts. The Act of 1946 introduced a new restriction which affected the operation of that scheme of control. It is true that some of the reasoning in the judgment turned on the terms of the Rent Restriction Act of 1920, s. 12, sub-s. 3, which requires the judge in a proper case to apportion the standard rent, and makes the apportionment "final and conclusive". But the court did not base its judgment solely on the effect of s. 12, sub-s. 3, and the broad principle which it applied is stated at the end of the judgment. The provisions of the Rent Acts, it is said, would be disturbed, and even overridden, if the applicant's argument were right. It is pointed out that the standard rent is the subject of careful and elaborate legislation, and that the Act of 1946 was intended to be supplementary to that legislation.

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(6) [1948] 2 K. B. 413.

The distinction between the present case and the *Bedrock* case (7) is that the flat in this case is fully furnished, and, while in that state, is not affected by any provision of the Rent Acts. If the reasoning in the *Bedrock* case (7) had depended upon the application to the flat of some specific provision in the Rent Restriction Acts, this distinction might be sound. If, for example, the ratio decidendi had turned entirely on the apportionment section, s. 12, the *Bedrock* case (7) would not apply. But for the reasons I have given I think that the decision in the *Bedrock* case (7) was wider than that, and that the question which I have to ask myself is whether the flat in this case is within the scheme of control set up by the Rent Acts, and, if so, whether the decision of the tribunal interferes with it.

I think that it is taking too superficial a view to treat this flat, because it is now furnished, as altogether outside the scope of the Rent Acts. It has fallen under the control of the Rent Acts; a standard rent has attached to it, and attaches, as it is sometimes said, in rem. So long as the flat is let furnished, it escapes the operation of the Acts. But once having come within the Acts, it is subject to what might be described as a conditional prohibition. Take a flat let fully furnished at 150*l.* which has a standard rent of 100*l.*, and the furnished rent of which is reduced under the Act of 1946 to 50*l.* In relation to that flat the Rent Acts are saying: "If you remove your furniture, you may not let the flat for "more than 100*l.*"; and the Act of 1946 is saying: "If you leave "your furniture where it is, you may not let the flat for more "than 50*l.*".

This latter prohibition seems to me to be an interference with the scheme of control operative under the Rent Restriction Acts, none the less so because the flat in its furnished state is only contingently under their sway. As the Court of Appeal pointed out in the *Bedrock* case (8), the standard rent must be treated as representing the return which the legislature regards as proper for a landlord of unfurnished or partly furnished premises to receive. If, by adding more to what he grants, the landlord receives less, the Act of 1946 ceases to be, as in the view of the Court of Appeal it ought to be, supplementary to the control devised by the Rent Acts, and becomes a major force. The contrary view, though this is perhaps only a matter of comment, would also lead to the absurdity that the landlord in this case could remove a part of the furniture so as to reduce the flat to the condition of a partly furnished flat, and then come back to the tribunal and demand, because of what she had taken away, that the rent should be increased.

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(7) [1948] 2 K. B. 413.

I have reached this conclusion without construing literally s. 4 of the Act of 1946 as applying to the premises in any and every condition, and whether let furnished or not. I have treated it as applying only to premises which fall within the scope of the Act, that is either fully furnished or partly furnished. If I had treated it as applying to premises even when they become unfurnished, the *Bedrock* case (8) would plainly apply, as Mr. Ashworth conceded; for the existence of the figure on the register would prevent the landlord from obtaining his standard rent. There is a passage in the judgment in the *Bedrock* case (9) (though I think it is obiter, because it is dealing only with an example) that states the view of the court that s. 4 would in such circumstances apply. I am, however, impressed by Mr. Ashworth's argument that it is necessary to read some limitation into s. 4. The point is considered in Megarry on the Rent Acts (6th ed.), p. 367. I need say no more than that I express no concluded opinion upon it.

LORD GODDARD, C.J. I agree with both the judgments which have been delivered and that the order for certiorari must be made.

Application granted.

Solicitors: *T. Richards & Co.; The Solicitor, Ministry of Health.*

(8) [1948] 2 K. B. 413. (9) Ibid. 419.

BURTON AND ANOTHER v. HOLDSWORTH.

C. A.

1951
June 22.

Jenkins and Birkett, L.JJ.

Practice and Procedure—Costs—Legal aid—Application by defendant to remit to county court failing plaintiff's security for costs—Jurisdiction to order transfer although plaintiff assisted person—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 46—*Legal Aid and Advice Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 1, *sub-s.* 7; *s.* 2, *sub-s.* 2; *s.* 12, *sub-s.* 2—*Legal Aid and Advice Act,* 1949 (*Commencement*) *Order,* 1950 (*S.I.* 1950, *No.* 1357)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 17.

Two plaintiffs started proceedings claiming damages for personal injuries alleged to have been caused by the defendant's negligence. One of the plaintiffs had become an assisted person under the Legal Aid and Advice Act, 1949, and the other had applied for legal aid. The defendant applied under s. 46 of the County Courts Act, 1934, to have the action remitted to the county court in default of the plaintiffs' giving security for the defendant's costs on the ground that the plaintiffs had no visible means of paying his costs should a verdict not be found for them. Streatfeild, J., made an order transferring the action to the county court unless the plaintiffs gave security for costs. The plaintiffs appealed on the ground that there was no jurisdiction to make such an order where the plaintiffs, or one of them, was in receipt of legal aid.

Held, that s. 46 of the County Courts Act, 1934, was designed to protect defendants from being put to expenses which they could not recover from the opposite party in High Court actions brought against them in tort by impecunious plaintiffs. That was a valuable right which, in view of s. 1, sub-s. 7, of the Legal Aid and Advice Act, 1949, should not be held to have been taken away in the absence of expression to that effect in the Act or in the regulations made under it. There being no such express provisions, the order to transfer to the county court was rightly made.

Conway v. *George Wimpey & Co. Ld.* [1951] W. N. 27 distinguished. *Perry* v. *London General Omnibus Co.* [1916] 2 K. B. 335 and *Cook* v. *Imperial Tobacco Co.* [1922] 2 K. B. 158 considered.

Semble, the power conferred by s. 12, sub-s. 2 (*b*) of the Act of 1949, to make regulations for the cases in which the court may require a person receiving aid to give security for costs does not authorize the making of any regulation which would take away the rights conferred on defendants by s. 46 of the County Courts Act, 1934.

Decision of Streatfeild, J., [1951] W. N. 343, affirmed.

APPEAL from Streatfeild, J. (1).

The plaintiffs, William Burton and Leslie Burton, two brothers, claimed damages from the defendant, J. R. Holdsworth, for injuries which they had sustained when riding a motor-

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(1) [1951] W. N. 343.

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bicycle belonging to William which came into collision with the defendant's lorry, the collision being alleged to have been due to the defendant's negligence.

The defendant applied under s. 46 of the County Courts Act, 1934 (2), to have the action transferred to the county court, if the plaintiffs failed to give security for his costs, on the ground that the plaintiffs had no visible means of paying his costs should a verdict not be found in their favour. That application first came before Master Baker, who adjourned the proceedings on being informed that William had applied under the Legal Aid and Advice Act, 1949, for legal aid. William was granted a legal aid certificate on the terms that he should make a contribution of 70*l*. 10*s*., payable by instalments of 30*s*. a week.

Leslie had also applied for legal aid, but his application had not been heard. The defendant's application next came before Master Lawrence, who dismissed it on the ground that, where a plaintiff was an assisted person, there was no jurisdiction to make an order under s. 46 of the Act of 1934.

On appeal, Streatfeild, J. (3), reversed the master's decision. He held that there was jurisdiction to make an order under s. 46 and he further held that in the circumstances an order of transfer was proper to be made. He accordingly made an order for the transfer of the proceedings if the plaintiffs failed to give security for the defendant's costs.

The plaintiffs appealed on the ground that there was no jurisdiction to make such an order in the case of an assisted person. However, they did not contend that the judge had exercised his discretion on any wrong principle, assuming, contrary to their contention, that he had jurisdiction.

(2) The County Courts Act, 1934, s. 46, sub-s. 1: "Where any action "founded on tort is commenced in "the High Court, the defendant may, "on an affidavit made by himself or "by any person on his behalf showing that the plaintiff has no visible "means of paying the costs of the "defendant should a verdict not be "found for the plaintiff, apply to the "High Court or a judge thereof for "an order to transfer the action to "a county court".

Sub-section 2: "On any such "application, the High Court or "judge, unless the plaintiff satisfies "the court or judge that he has such "means as aforesaid, may, if the "court or judge having regard to all "the circumstances of the case "thinks fit so to do, make an order "that, unless the plaintiff within a "time to be limited in the order "gives security for the defendant's "costs to the satisfaction of the court "or a judge, the action shall be "transferred to such county court to "be named in the order, as the court "or judge may deem the most convenient to the parties".

(3) [1951] W. N. 343.

A. H. Glenn Craske for the plaintiffs. It has been held that an order under s. 46 of the County Courts Act, 1934, is not an order for security of costs. It is an order to remit, which can be avoided if security is given. Accordingly, the plaintiffs do not rely on *Conway* v. *George Wimpey & Co. Ld.* (4), where it was held that an assisted person cannot be ordered to give security for costs, the authority which the master held to govern this matter. It is submitted that the effect of the Legal Aid and Advice Act, 1949 (5), is to make s. 46 of the Act of 1934 a dead letter in the case of an assisted person, since such a person will never have no visible means of paying a defendant's costs. "Visible means" of paying the defendant's costs must refer to the sum which an assisted plaintiff can be ordered to pay having regard to the provisions of the Act of 1949. Under s. 12, sub-s. 2 (*e*), his liability is limited to paying the sum, if any, which

(4) [1951] W. N. 27; [1951] 1 All E. R. 56; [1951] 1 T. L. R. 215.

(5) Legal Aid and Advice Act, 1949, s. 1, sub-s. 7: "Save as "expressly provided by this part of "this Act or by regulations made "thereunder . . . (*b*) the rights con-"ferred by this part of this Act on a "person receiving legal aid shall not "affect the rights or liabilities of "other parties to the proceedings or "the principles on which the dis-"cretion of any court or tribunal is "normally exercised".

Section 2, sub-s. 2: "Where a per-"son receives legal aid in connection "with any proceedings . . . (*e*) his "liability by virtue of an order for "costs made against him with respect "to the proceedings shall not exceed "the amount (if any) which is a "reasonable one for him to pay hav-"ing regard to all the circumstances, "including the means of all the "parties and their conduct in con-"nection with the dispute".

Section 12: "(1). The Lord Chan-"cellor may make such regulations "as appear to him necessary or de-"sirable for giving effect to this part "of this Act or for preventing abuses "thereof. (2). Without prejudice to "the foregoing sub-section or any "other provision of this Act authoriz-"ing the making of regulations, regu-"lations may— . . . (*b*) regulate the "procedure of any court or tribunal "in relation to legal aid, and in par-"ticular make provision— . . . (ii) "as to the cases in which and extent "to which a person receiving legal "aid may be required to give "security for costs, and the manner "in which it may be given".

The Legal Aid (General) Regulations, 1950, reg. 17: "Where an "order for costs is made against an "assisted person, then, subject to the "provisions of the next following "paragraph of this regulation—(*a*) "the determination of the amount of "his liability for costs in accordance "with s. 2, sub-s. 2 (*e*), of the Act "shall, save as is hereinafter pro-"vided, be made at the trial or hear-"ing of the action, cause or matter "and be final; . . . (*d*) the court "may order the assisted person to "pay, by instalments or otherwise, "either—(i) such amount, if any, as "the court thinks reasonable having "regard to all the circumstances; or "(ii) an amount to be determined on "taxation not exceeding such amount "as the court thinks reasonable hav-"ing regard to all the circumstances; "and the order may provide that pay-"ment shall not be made or instal-"ments shall not become due until "such date as the court may "determine".

it is reasonable for him to pay in all the circumstances. A plaintiff is now only liable to pay what he in fact can pay. This also appears from the provisions of reg. 17 (1.) (*d*) of the Legal Aid (General) Regulations, 1950.

The position under the Legal Aid and Advice Act, 1949, is different from that under the old poor-persons procedure, for a poor person, unlike an assisted litigant, was always liable to pay full costs if he lost: see *Olds* v. *Olds* (6). No fetter was imposed on the court's discretion by the old poor-persons procedure. Section 12, sub-s. 2 (*e*), of the Act of 1949, and reg. 17 (1.) (*d*) of the Rules of 1950 impose a fetter on the court's power to order an assisted person to pay costs; the power is now limited to making such order as is within the assisted litigant's capacity to pay. Accordingly, the decisions in *Perry* v. *London General Omnibus Co.* (7) and *Cook* v. *Imperial Tobacco Co.* (8), where orders were made for the transfer of proceedings to the county court notwithstanding the fact that the plaintiffs were poor persons, are no authority in the case of plaintiffs who are assisted persons under the Act of 1949.

Lastly, it is submitted that it appears here that the plaintiff William has visible means of paying the defendant's costs since, after the contribution of 70*l*. 10*s*. 0*d*. has been paid, an order could be made for William to make additional weekly payments.

Neil Lawson, for the defendant, was not called on to argue.

JENKINS, L.J. The case is one of some general interest and importance inasmuch as it concerns the effect of the Legal Aid and Advice Act, 1949, on the power of a court or a judge to make an order of transfer under s. 46 of the County Courts Act, 1934. The question is, in brief, whether the circumstance that a plaintiff has become an assisted person under the Act ousts the jurisdiction of the court to make an order of transfer.

[His Lordship stated the facts and read s. 46 of the County Courts Act, 1934, and continued:] There are two points to be noted about s. 46 of the County Courts Act, 1934. First, an essential condition of its application is that the plaintiff should be shown on affidavit to have no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff; and, secondly, the order to be made under the section in a proper case is not in the ordinary sense an order for security for costs to

(6) [1948] P. 282.
(7) [1916] 2 K. B. 335.
(8) [1922] 2 K. B. 158.

be given by the plaintiff but an order for transfer which the plaintiff, if he elects to do so, may avoid by giving the security for costs stipulated by the order. No question being raised as to the principle on which the judge exercised his discretion, one must take it that, apart from the Legal Aid and Advice Act, 1949, and the regulations made under it, there is no doubt but that the order for transfer was properly made.

One of the provisions of the Act of 1949 to which we were referred as being material for the purposes of the argument in the present case was sub-s. 7 of s. 1, which is relied on by the defendant. He contends that s. 46 of the County Courts Act, 1934, confers on him a valuable right, which should not be deemed to have been taken away from him by the Act of 1949, or the regulations made under it, unless there is something amounting to an express provision to that effect.

Section 2, sub-s. 2, is used by Mr. Craske in his argument for the plaintiffs. He says that in order to find out for the purposes of s. 46 of the County Courts Act, 1934, whether a plaintiff has visible means of paying the defendant's costs regard must, if he is an assisted person, be had to the limitation of his liability for costs under the Act of 1949, and the regulations made under it; and that, inasmuch as an assisted person's liability for costs is, in effect, measured by reference to his ability to pay, it can never be said that he has no visible means of paying the defendant's costs if, as is contended, the reference in s. 46 to the defendant's costs should be construed as meaning such costs as the plaintiff as an assisted person will or may be ordered to pay to the defendant.

No regulations have yet been made under s. 12, sub-s. 1, covering the cases in which, or the extent to which, a person receiving legal aid may be required to give security for costs, or the manner in which it may be given. Accordingly, even if s. 12, sub-s. 2 (*b*) (ii) could be held to refer to the security to be fixed in a s. 46 order as an alternative to transfer to the county court, nothing has yet been done under the Act of 1949 purporting to affect the provisions of s. 46 as to security.

It was not contended by Mr. Craske that this sub-para. (*b*) was in fact referring to the s. 46 security at all, for the s. 46 order is not, in the ordinary sense, an order for requiring security to be given. Security as fixed may, at the option of the plaintiff, be given as an alternative to the transfer otherwise ordered; the order is one for transfer unless such security is given. I think it reasonably plain that the rule-making authority could not under

s. 12, sub-s. 2 (*b*), by making regulations purporting to regulate the procedure of the court as to requiring security for costs, take away the right conferred on defendants by s. 46 of the County Courts Act, 1934.

Section 17 defines the expression "order for costs" as including "any judgment, order, decree, award or direction for "the payment of the costs of one party to any proceedings by "another party, whether given or made in those proceedings or "not".

The Legal Aid and Advice (Commencement) Order, 1950, brought the Act into operation in relation to cases, among others, which have been remitted or transferred by the Supreme Court of Judicature to a county court. The order makes it clear that the transfer in the present case will not deprive the plaintiff William, who is already an assisted person, or the plaintiff Leslie, on the assumption that he obtains a certificate, of their rights as assisted persons. We were also referred to the regulations, beginning with reg. 17, which concerns costs awarded against an assisted person and provides for the method of determining the amount of the liability for costs in accordance with s. 2, sub-s. 2 (*e*).

The master held himself precluded from making the order for transfer by the decision of this court in *Conway* v. *George Wimpey & Co. Ld.* (9), where the plaintiff had been ordered to give security for the costs of the appeal under R. S. C., Ord. 58, r. 15. Since the order for security had been made, he had become an assisted person and had obtained an emergency certificate. He applied for a discharge of the order for security, and this court held that the order should be discharged. After citing the decision of this court in *Willé* v. *St. John* (10), where similar circumstances arose in the case of a person who had been admitted as a poor person under the old Poor Persons Rules, Cohen, L.J., referred to the provisions as to the making of regulations contained in s. 12 of the Legal Aid and Advice Act, 1949, and in particular to the power to regulate the procedure of any court with respect to security for costs, and came to the conclusion that, in the case then before the court, as no special circumstances were shown and there had been no guidance in the form of regulations made under s. 12 as to the circumstances in which security should be ordered, the order ought to be discharged.

(9) [1951] W. N. 27; [1951] 1 T. L. R. 215; [1951] 1 All E. R. 56.

(10) [1910] 1 Ch. 701.

Mr. Craske admits, as the judge held, that this case is not governed by *Conway* v. *George Wimpey & Co. Ld.* (12), and I entirely agree. The security there in question was one of a different order. It was security of the kind which the court, as a matter of procedure, can direct a plaintiff or appellant to give, in certain circumstances, as a condition of prosecuting his action or appeal. Orders of that kind are orders for security in the strict sense and if they are not complied with the action or appeal in question is stayed or dismissed.

In a case in which an appellant had obtained a certificate as an assisted person for the purpose of prosecuting an appeal, an order putting him on terms which required him to give security or otherwise be shut out from prosecuting his appeal might well be regarded, in the absence of special circumstances, as inconsistent with the intention of the Legal Aid and Advice Act. The matter here in question is entirely different. Section 46 admittedly is not a section which orders security and in default dismisses or stays the action: it is a section under which the court, if in all the circumstances of the case it appears right to do so, may make an order transferring the action to the county court. The plaintiff, if dissatisfied with that, is given the opportunity of preventing the transfer by providing for the stipulated security. Therefore I think that *Conway* v. *George Wimpey & Co. Ld.* (12) has no bearing upon the present case.

Other authorities under the old Poor Persons Rules were to some extent relied on by the judge. Mr. Craske says, I again agree with him, that those cases cannot be regarded as authorities governing the situation under the entirely different Legal Aid and Advice Act, 1949, and regulations made thereunder. They are, however, of some assistance by way of analogy.

There are two cases, *Perry* v. *London General Omnibus Co.* (13) and *Cook* v. *Imperial Tobacco Company* (14), in which under the provisions then corresponding to s. 46 defendants applied for the transfer to the county court of actions brought by poor persons in the High Court. In both these cases orders were made although, as the Poor Persons Rules then stood, the effect of such a transfer would be to preclude the plaintiffs from prosecuting their actions in the county court as poor persons, inasmuch as the poor-persons procedure did not provide for litigation in county courts. Thus it may be said that the transfers there made did entail some hardship on the plaintiffs, inasmuch as they prejudiced their rights to sue as poor persons. Nevertheless, the court thought that this hardship was no sufficient ground for denying the defendants their rights under what corresponded to s. 46.

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(12) [1951] W. N. 27; [1951] 1 T. L. R. 215; [1951] 1 All E. R. 56.

(13) [1916] 2 K. B. 335.

(14) [1922] 2 K. B. 158.

Those two decisions do therefore afford some analogy, and I think that this case is one in which on general principles it seems that, a fortiori from those cases, an order for transfer ought to be made.

Having disposed of those matters, I come to what was really Mr. Craske's essential argument. It turns on the reference in s. 46 to an affidavit "showing that the plaintiff has no visible "means of paying the costs of the defendant should a verdict not "be found for the plaintiff". "The costs of the defendant", says Mr. Craske, "must mean such costs as the plaintiff will "become liable to pay in the event of the defendant's successfully "defending the action". It follows, in his submission, that it cannot ever be said of an assisted person that such a person has no visible means of paying the defendant's costs, because the provisions of the Act and regulations to which I have referred ensure that the costs payable by the assisted person shall be limited to such amount as in the judgment of the court is within the assisted person's means or capacity to pay. Thus, says Mr. Craske, in effect, although s. 46 has not been repealed or abrogated by the Legal Aid Assistance Act, 1949, or the regulations made thereunder, as a matter of construction its provisions cannot be applied to an assisted person.

The judge rejected that argument, and in my judgment he was right in doing so. Section 46 is designed to protect defendants. The relevant costs to which it refers are the costs which the defendant will incur in defending the action. Those are the costs in which he is interested, and the relevant matter for the purpose of s. 46 is the absence of any visible means by the plaintiff of paying the defendant's costs in that sense, the costs incurred by him, subject, of course, to taxation or, in other words, the costs which ordinarily an unsuccessful plaintiff would be ordered to pay the defendant in the event of the usual order for taxation and payment of those costs being made.

Judging by that standard the judge held, and in my view there was ample ground on which he could so hold, that in the present case the plaintiffs had no visible means of paying the defendant's costs. In my judgment it cannot be said that their ability to pay the defendant's costs in that sense was one whit increased by the fact that William became an assisted person.

Indeed the very fact that he became an assisted person, I should have thought, to some extent argues inability to pay the defendant's costs.

By way of elaboration of the same argument Mr. Craske sought to demonstrate by reference to the assessment of William's contribution and the provision that he should pay that contribution of 70*l.* 10*s.* 0*d.* by instalments of 30*s.* 0*d.* a week, that visible means were shown, inasmuch as it seemed probable that after satisfaction of his contribution of 70*l.* 10*s.* 0*d.* by the instalments of 30*s.* 0*d.* a week he would be able to satisfy any costs awarded to the defendant by like instalments. In my judgment that in no way amounts to showing that the plaintiff has visible means to pay the defendant's costs within the meaning of s. 46.

In conclusion, I would observe that s. 46 is designed to protect defendants from being put to expenses which they cannot recover from the opposite party in High Court actions brought against them in tort by impecunious plaintiffs. It is a valuable right and a valuable protection to defendants against whom such actions are brought. In my judgment, particularly in view of sub-s. 7 of s. 7 of the Legal Aid and Advice Act, 1949, that right should not be held to have been taken away either by the Legal Aid Act itself or the regulations made under it, unless something is found in that Act or in those regulations which either expressly or at least by necessary implication has that effect. I find no such feature either in the Act or in the regulations.

For these reasons, in addition to those given by the judge, whose careful judgment in this matter I might well have adopted without adding any reasons of my own, I am of opinion that he came to a right conclusion, and that the appeal should be dismissed.

BIRKETT, L.J. I might adopt the closing sentences of my Lord's judgment, but, as the point is one of general importance, I will add a few words.

The point came before the judge and comes before this court on a misinterpretation of *Conway* v. *George Wimpey & Co. Ld.* (15). The distinction between the facts in that appeal, and the circumstances which arise when s. 46 of the County Courts Act, 1934, are considered was not clearly kept in mind. The master, as I understand, with other masters, took the view that the decision

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(15) [1951] W. N. 27; [1951] 1 T. L. R. 215; [1951] 1 All E. R. 56.

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in *Conway* v. *George Wimpey & Co. Ld.* (16) was such that they could not make the order prayed for under s. 46, sub-s. 1. A reading of that case shows that it concerns an absolutely distinct matter, where an order for security for costs had been properly made before the order making the litigant an assisted person was made. The court said, in the absence of the regulations which were foreshadowed, that they thought it proper to say that an order for security should not be made against a litigant in that position.

Streatfeild, J., clearly pointed out in the present case that no order for security for costs was in fact made in that sense, because it is quite clear that, if the order which was incorporated in the judgment of the judge was disregarded, nevertheless the case would be heard in the county court, and to that extent the assisted person would be in a more advantageous position than formerly.

Mr. Craske quite frankly said that he could not support the decision of the master on the ground on which it was put. He agreed that *Conway's* case (16) has no application to the facts of the present case. But, seeing that he was arguing a point of general importance, he thereupon collected every argument that was possible in order to substitute them for the point which he was unable to support. He argued that it is never possible now to say that a plaintiff, assisted under the provisions of the new Act, has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff. He went the length of saying quite frankly that s. 46, so far as a legally aided person is concerned, has in fact become a dead letter, which would be surprising. He then said that the cases which were cited to the judge in the court below, and which admittedly concerned poor-persons procedure, were really not applicable now because conditions had been entirely changed by the Act of 1949. The principal change which that Act has made, in the submission of Mr. Craske, is that where, under the poor-persons procedure, the decision of the judge was completely unfettered, now it is a fettered discretion; and he enumerated the various matters in which, he claimed, the discretion was fettered.

I think that his third point was really an elaboration of the first, in that he descended to detail, and said that on the special facts of this case it was quite clear from the figures that the plaintiff William Burton would be able to pay costs after the instalments had been paid which have been ordered by the committee; and that, accordingly, it could not be said that he had no visible means of meeting the costs of the action.

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(16) [1951] W. N. 27; [1951] 1 T. L. R. 215; [1951] 1 All E. R. 56.

With regard to the two cases, which Mr. Craske submitted had now no application at all, the facts of the first, *Perry* v. *London General Omnibus Co.* (17), were materially different from the facts here, because it was plain in that case that s. 66 of the County Courts Act, 1888, had the very important words " a cause " of action fit to be prosecuted in the High Court ". I can understand that those words relate to considerations which are not material to this case today, though they have a very important bearing on it.

The second case was *Cook* v. *Imperial Tobacco Company* (18). While it may be true that these cases are no longer strictly applicable in the changed circumstances with which we are confronted, nevertheless they are of very great importance because it emerged plainly that this right of a defendant in a proper case to have the case transferred from the High Court to the county court was not curtailed by the circumstances that the transfer would mean that the poor person could not prosecute the litigation as a poor person in the county court. For the purpose of this appeal, the importance of both those cases is to show that the defendant's right, as I think a most valuable one, was maintained.

When I look at s. 1, sub-s. 7, of the Act of 1949, I have to ask myself, is there any express provision to be found in this Act or in the regulations made under it that s. 46 of the Act of 1934 shall no longer have any application? There is none, and it is not contended that there should be.

Mr. Craske, however, says that the Act and the regulations have in fact taken away that right because of the impossibility of its performance. I should need a great deal of argument before I should be convinced that that result is to be brought about unwittingly by the provisions of the Act of 1949 or the regulations. Indeed Mr. Craske frankly said that s. 46, sub-s. 2, valuable though it may be, maintained though it has been in days past, in these other and more difficult circumstances has virtually been repealed by the Act of 1949 and the regulations. I cannot think so. Further, I cannot think that the argument on which it is based is sound. Mr. Craske says that " the plaintiff has no

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(17) [1916] 2 K. B. 335.

(18) [1922] 2 K. B. 158.

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"visible means of paying the costs of the defendant" must now be interpreted in some such way as "No visible means of paying "such costs as should be determined by the court having regard "to the provisions of the Act of 1949". I cannot think that that interpretation ought to prevail. The costs of the defendant in s. 46, sub-s. 1, are, I think, the costs that in the ordinary way the defendant will incur. It may very well be that they will be the taxed costs that the defendant will incur. The costs of the defendant referred to in s. 46 are those costs and not the much more restricted costs which Mr. Craske suggested today. I am quite content for my own part to adopt the judgment delivered by my Lord.

Appeal dismissed.

Solicitors: *Stocken, May, Sykes & Dearman; A. E. Wyeth & Co.*

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In re C. W. M., 1941, No. 2396.

Lunacy—Settlement of lunatic's property—Application by receiver of the estate—Power of revocation—Law of Property Act, 1925 (15 *Geo* 5, *c.* 20), *s.* 171, *sub-ss.* 1, 5.

The Law of Property Act, 1925, by sub-s. 1 of s. 171, empowers the court to direct a settlement of the property of a lunatic or defective, or any part thereof or any interest therein, on such trusts and subject to such powers and provisions as the court might deem expedient.

By sub-s. 5 it is provided: "Subject to making due provision "for the maintenance of the lunatic or defective in accordance with "his station in life, whether out of the capital or income of the "property settled or other property . . . and to providing, by "means of a power of appointment or revocation, or otherwise, for "the possibility of the lunatic or defective recovering full capacity", the court may have regard to certain specified matters.

On a summons by the receiver of the lunatic's estate for the approval by the court of a settlement which, although it made due provision for maintenance, contained no provision by means of a power of appointment or revocation, or otherwise, for the possibility of the lunatic recovering full capacity:—

Held, that in considering the possibility of the patient recovering the court was not compelled to insert in the settlement either a power of revocation or some equivalent provision, and that where, as in the present case, the resources which would be left unaffected by the settlement were sufficient to take care of the position should the patient recover it was unnecessary to insert any reservation in the settlement.

In re Greene [1928] Ch. 528 applied.

APPLICATION, by summons, by the receiver of a lunatic's estate to the court, sitting as Judges in Lunacy, for an order under s. 171 of the Law of Property Act, 1925 (1), directing a settlement of the lunatic's property.

The facts were stated in the judgment of Somervell, L.J., substantially in the following terms:—

The patient is seventy years old and the medical evidence is that there is no prospect of her recovering her mental capacity, but she is otherwise in good health. The application is made by the receiver of her estate and is supported by her six children and thirteen grandchildren. She is represented by the Official Solicitor. The dealings which it is suggested should be sanctioned are, it is submitted, such as the patient would have carried out herself. They will result in an immediate benefit to the children and, as will be seen, some benefit to herself; and, if she lives for five years, there will be a very substantial saving of estate duty.

The patient has free property worth 393,000*l*. It includes a life policy the premium on which is 1,022*l*. a year. The nominal value of the policy is 30,000*l*., but substantial profits have accumulated and it could be converted into a paid-up policy of 44,000*l*. There are shares in a private or family company worth some 178,000*l*. There are two loans to two of her children, of about 15,000*l*. each, which are charged on their reversionary interests in a fund of 80,000*l*., in which the patient has a life interest, which passes to her six children equally on her death, subject to a power of appointment. She also has a life interest in a fund of 7,700*l*. which, on her death, goes to her eldest son.

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(1) Law of Property Act, 1925, s. 171, sub-s. 1: "The court may "direct a settlement to be made of "the property of a lunatic or defective, or any part thereof or any "interest therein, on such trusts and "subject to such powers and provisions as the court may deem "expedient, and in particular may "give such directions . . . (*b*) where "the property has been acquired "under a settlement, a will or an "intestacy, or represents property so "acquired".

Sub-section 5: "Subject to making "due provision for the maintenance "of the lunatic or defective in accordance with his station in life, "whether out of the capital or "income of the property settled or "other property or partly in one "way and partly in another, and to "providing, by means of a power of "appointment or revocation, or otherwise, for the possibility of the "lunatic or defective recovering full "capacity, the court may, in making "any order under this section, have "regard to" certain matters considered material.

Sub-section 7: "At any time "before the death of the lunatic or "defective, the court may, as "respects any property remaining "subject to the trusts of a settlement "made under this section, on being "satisfied that any material fact was "not disclosed to the court when the "settlement was made, or on account "of any substantial change in circumstances, by order vary the "settlement in such manner as it "thinks fit and give any consequential directions".

Those are the items of free property and settled property with which we are concerned. I think that the whole property produces a gross income of 16,216*l*., which is reduced by tax to a net income of 3,734*l*. Out of this at present has to be paid the premium, 1,022*l*., and her maintenance, which comes, with incidental expenses, to about 2,000*l*. There were gifts to children which were sanctioned and amounted last year to 810*l*., and some subscriptions to charities. The amount spent slightly exceeded her net income. She had made a will of her disposable property, which, subject to legacies for 6,000*l*., left the residue to her children, substituting issue, if any, of the children who predeceased her; and there was a hotch-pot clause, and so on.

The proposals are: (1.) to convert the policy into a paid-up policy; (2.) that she, the patient, should purchase the reversionary interests of the children in the 80,000*l*., and this can be done (and this is agreed) at a proper valuation for 14,500*l*., which takes into account anticipated liability to death duties. This sum would be satisfied by the proper proportion of shares in the private company, the balance of the shares in that company to be distributed between the children, subject to hotchpot, and settled in trust for them and their issue, without any power of revocation or the reservation of any interest to the patient.

Cross, K.C., and *Wigglesworth* for the receiver. This summons is brought under s. 171 of the Law of Property Act, 1925, for the sanction by the court of a proposed settlement of the property of the lunatic, which, it is submitted, she would herself have carried out if she had had the mental capacity and had been legally advised. Assuming that the court has jurisdiction to sanction the settlement it is agreed that there will be clear advantage to the patient. It is submitted that the court has inherent jurisdiction to direct the settlement, but that point is not stressed because it is preferred to rely on s. 171 of the Act of 1925.

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The question is whether, having regard to the wording of sub-s. 5, the court has to make provision for the recovery of the patient by means of a power of revocation. It is submitted that the sub-section does not make it mandatory on the court to impose such a condition where, as in this case, ample provision is made for the maintenance of the patient, and her capital is so large that she will not be affected by the settlement. If it had been thought necessary to insert in the settlement some power of revocation, then it would appear that sub-s. 7, which gives the court power to vary a settlement, is unnecessary.

In *In re Greene* (2) the Court of Appeal construed sub-s. 5 as being a pointer to the court on matters which it should take into consideration, and appear to have taken the view that as long as due provision was made for the maintenance of the patient it was unnecessary to make any reservation for revocation. That case is binding on this court.

T. A. C. Burgess and *J. F. Bowyer* for the children and grandchildren.

W. F. Waite for the Official Solicitor. The scheme is a perfectly good one if the court has jurisdiction to sanction it. The question is whether the apparent freedom to direct the settlement given by sub-s. 1 of s. 171 remains in the light of sub-s. 5. It is submitted that the court can only have regard to the matters set out in sub-s. 5 if the settlement contains a power of revocation. The court must make due provision for the maintenance of the patient, and the provision of a power of revocation is equally obligatory. There is nothing in the judgments in *In re Greene* (2) to show that the settlement did not contain a power of revocation, and the decision may be per incuriam. No mention of sub-s. 5 appears in the report.

Cur. adv. vult.

July 26. The following judgments were read:—

SOMERVELL, L.J. [after stating the facts as set out above]. These arrangements, stated in the proposed settlement, will, if the patient lives for five years or more, bring about a very substantial saving in death duties. The children get the income, and it is provided with regard to five children that after seven years their interest becomes absolute in the proper proportion of the capital; the trusts with regard to the sixth child, the details of which do not matter, are different and in substance his

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(2) [1928] Ch. 528.

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interest is for his children. The proposals will leave the patient with a gross income of about 10,000*l*. and a net income of 3,191*l*., and free property of about 274,000*l*. The insurance premium, of course, is saved, and it seems to me that the arrangement should, unless some very special circumstances arise, avoid the necessity of further gifts to the children. On this basis—that is to say, taking into account the saving of the premium and the disappearance of gifts to the children—she would, on the current figures, have a surplus of about 1,000*l*. instead of the small deficit which she had last year or the year the figures for which were put before us.

Mr. Waite, for the Official Solicitor, agrees, and I agree, that the scheme is a scheme proper to be sanctioned, if there is jurisdiction to do so. The question turns on the construction of s. 171 of the Law of Property Act, 1925, and in particular sub-s. 5. [His Lordship read s. 171, sub-s. 1 (*b*) and sub-ss. 5 and 7, and continued:] It has, I think, been held or suggested that paras. (*a*), (*b*) and (*c*) of sub-s. 1 are not necessarily exhaustive, but the question here falls under (*b*) "where the property has been "acquired under a settlement, a will or an intestacy, or repre-"sents property so acquired". That, I understand, is common ground. I do not think sub-s. 7 assists. The issue turns on sub-s. 5. The point is this: do the latter words of that sub-section preclude the sanction of a settlement of any property unless a power over it is preserved which would be exercisable by the lunatic if he or she recovered? It is not suggested that they preclude a settlement of income pending recovery, and indeed the earlier words of the sub-section, where regard is to be had (I use neutral words) to the maintenance of the lunatic, seem to me to assume that there may be at the least a settlement of income which will be disposed of and spent during the period before the lunatic recovers. One could, of course, understand a provision that capital could not in any case be encroached upon. If this had been the intention, one would have thought that different words would have been used. If capital can be encroached upon, it might be exhausted if and when the lunatic recovered.

The words are, I think, capable of meaning—and Mr. Cross did not really dispute this—that with regard to particular property settled there must be some power exercisable by the lunatic if he recovers. I suggested in the course of the argument the possibility of sanction being sought for a marriage settlement. Whatever might have been the powers before this section was passed (and I am not concerned with them) it would seem to me now to fall under this section. One may imagine the case of a man with three daughters who, before he had become of unsound mind, having ample resources, settled 50,000*l.* on the first daughter to be married, with trusts for the education of children, and so on. One can imagine that a man might have told all his daughters that that is what he would do for them. He then becomes of unsound mind and the second daughter becomes engaged to be married. Under sub-para. 1 of sub-s. 5 the court is to have regard to "the manner in which the "property has been settled or dealt with on former occasions"; and I would have thought, and one would expect, I think, that there would be power to make a marriage settlement, on the facts as I have put them, in the form in which, quite plainly, the patient would have made it if he had remained of sound mind, namely, without a power of revocation, and I am assuming there would be no such power of revocation in the original marriage settlement.

I have said that I think the words are capable of what I may call the narrower construction, but are they capable of the wider construction which would cover inter alia the above case? Before I come to the authority which is all-important, I will consider the words. Put very generally, can these words mean that the court is to have regard to the possibility of the lunatic recovering and is to consider his reasonable needs and so on should that happen? In the case that I have put of a marriage settlement I am assuming that the marriage portions leave ample resources not only for the maintenance of the lunatic but also to leave him, should he recover, with the resources which the court is clear he would have left himself if he had been of sound mind when the second daughter married. Must the court, on the narrower construction, leave him with a power which they are satisfied he would not himself have sought to maintain?

The section is curiously worded. In considering due provision for maintenance the court is directed to have regard to the property not settled. That is plain enough and common sense, but that is treated as a provision made by the court—"subject "to making due provision for the maintenance of the lunatic or "defective . . . whether out of the capital or income of the "property settled or other property". The words "to making "due provision" must, as it seems to me, therefore, be read as meaning "there being due provision". I can see no distinction between the meaning of "making due provision" and "providing", which is the word which initiates the second limb of the sub-section. One can therefore read the words of the latter half in this way: "Subject to there being due provision by means "of a power of appointment or revocation or otherwise for the "possibility of the lunatic or defective recovering full capacity, "the court may", etc.

Does the word "otherwise" entitle the court to consider the other property and proceed on the basis that the possibility of the lunatic recovering, having regard to what is left, make the insertion of a power of appointment or revocation in respect of the property settled unnecessary as a matter of construction? I think that this latter is a possible construction and that the words are capable, having regard to the form of the section to which I have referred, of that meaning.

Unaided by authority, I would have found the question a difficult one. I would have expected the court to have that wider power. There are obviously certain types of settlement which it might be clear the lunatic would wish to make if of sound mind where a power of revocation would plainly be inappropriate. The question, however, is not what one expects but what has Parliament said.

I will now turn to the authority on which Mr. Cross relies, *In re Greene* (4), which concerned a mother and two children. The children, a son and a daughter, had been certified as of unsound mind in 1902 and 1910. They had made no wills and they had no next of kin within the statute except their mother herself and an aunt who was well advanced in years. A marriage settlement had been made when the father and mother married in 1879, and under that settlement, into which further sums had I think been paid by the mother, there was a provision that she, the husband having predeceased her, should have a life interest and it should then go absolutely to the children, subject to powers of appointment and so on. Also the mother's father, the grandfather of the two patients, had died in 1885; he left very considerable property and that also, subject to the mother's life interest, went to the children (and they were, I should have stated, the only two surviving children) absolutely. If nothing was done, therefore, and the mother and aunt died before the children, when they died the Crown would take on an intestacy, there being no next of kin. The mother sought a power of disposition herself over the marriage settlement funds and originally over part of what I will call the will property. That had been by arrangement with the Crown. There had been some arrangements by which the application was made to that extent, although the Crown did not agree altogether to what was being asked. The court gave her no power over the will property, which was according to the judgment ample in amount for the two patients—a very large sum of money—but it gave her power to dispose of the marriage settlement property absolutely on her death. In other words, the patients were cut out altogether.

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(4) [1928] Ch. 528.

There were very special circumstances in that case, which are referred to as such in the judgment, but the court clearly proceeded on the wider construction of s. 171, sub-s. 5, which I have outlined. There was no power over the marriage settlement property reserved to the patients which they could have exercised if they recovered; and if the power was exercised by the mother and they survived their mother, the whole property would have disappeared. It would seem conclusive, therefore, in favour of what I may call the wider construction.

In the minutes of the order submitted to the court there was a provision for preserving a right for maintenance during the lives of the patients, and that is summarized in a passage in the judgment of Sargant, L.J., which I will read in a moment, but the court thought that was unnecessary, and I rather doubt whether on any view—though we have not to decide it—mere postponement would have been or could have been regarded as a power of revocation. One would have thought it would be necessary to go further than that, and to provide that if the lunatics recovered they could have overridden the powers given to the mother altogether, and the powers given to the mother therefore would have to be postponed, so far as their being executed was concerned, till both patients were respectively dead.

Mr. Waite submitted that there might have been a power of revocation in the settlement, though I think it could only have been on the possibility of their recovering during their mother's lifetime. It was important to see, if possible, whether that was so, and we have now had a copy of the settlement sanctioned, and there is no such power of revocation.

Sargant, L.J., said (5): "In the minutes of order submitted

(5) [1928] Ch. 559.

C. A.
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C. W. M., 1941, No. 2396, *In re.*

Somervell, L.J.

"to us an express provision was inserted for preserving the right "of each patient to maintenance, if necessary, out of the income "of his or her share of the marriage settlement funds in priority "to the power of disposition over those funds to be given to the "applicant. But this appears to be quite unnecessary and to "introduce a needless complication into the proposed settlement. "As matters stand, each patient will be entitled on the death "of the applicant to one moiety in possession of the whole of the "proceeds of the real and personal estate, subject to the will of "the testator John Jones"—that is the patients' maternal grandfather—"and it is obviously unnecessary to make or pre-"serve any additional provision for either of them".

Lawrence, L.J., having dealt with what I call the merits and decided that the proposal could be sanctioned, said (6): "Having "arrived at this conclusion, I agree with the other members of "this court that, as the patients are amply provided for other-"wise, there is no need to make any provision in the proposed "settlement for the maintenance of the patients out of the "settlement funds, and that the power of appointment proposed "to be conferred on the applicant can properly be made to "operate both on the capital and on the income of the settled "funds immediately on the death of the applicant. I further "agree that in the circumstances there is no need to make any "reservation in the settlement as regards any present or future "disposition by the patients or as to the possible right of the "patients' paternal aunt". In that passage Lawrence, L.J., is expressly directing his mind to the question whether there need be any reservation in the settlement.

The fact on which Mr. Waite relied with regard to this case was that there is no mention in the judgments or, so far as one can see, in the arguments, of sub-s. 5. In the argument Mr. Hurst said (7): "Under s. 171 there is no jurisdiction to order "capital to be handed over during the life of a lunatic, but it is "submitted that Mrs. Greene should be given a general power "of appointment". That view was clearly not the view that was acted on by the court; but Mr. Waite, who quite rightly put every point before us on the construction of this section, submitted that we ought to come to the conclusion that the decision was per incuriam. It is, I think, somewhat strange that there is no express reference to this sub-section, but I do not think that we can treat the decision as one given per incuriam. It was a reserved judgment, with eminent counsel appearing and arguing on various sides familiar with this branch of the law, and the decision proceeds quite plainly on the basis of what I call the wider construction of sub-s. 5, namely, that in considering the possibility of the patient recovering the court is not compelled to insert in the settlement of the property settled either a power of revocation or some equivalent provision, but that it can, as in considering maintenance, have regard to the resources which will be left unaffected by the settlement, and if those are considered to take care of the position should the patient recover, then there is no need to put any reservation into the settlement.

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(6) [1928] Ch. 528, 563.

(7) Ibid. 534.

For those reasons, it seems to me that we have jurisdiction to sanction these proposals. Some reference was made to the inherent jurisdiction of the court. In what I am about to say I am not dealing with the powers of the court other than in relation to the subject-matter which is dealt with in s. 171, but in so far as the subject-matter of that section is concerned, I cannot think that if in that section a particular limit is placed on the powers of the court, that limit with regard to that matter could be overridden by virtue of any inherent jurisdiction.

I think that these proposals should be sanctioned; and we can discuss the next step when my brethren have delivered their judgments.

Denning, L.J. I agree.

Hodson, L.J. I agree. I think that the construction of s. 171, sub-s. 5, of the Law of Property Act, 1925, contended for by the applicant is a difficult one, and for my part I do not think that the language of s. 171, sub-s. 1, is sufficient to avoid the difficulty. It is quite true that sub-s. 1 reads as follows: "The court may direct a settlement to be made of the property "of a lunatic or defective, or any part thereof or any interest "therein, on such trusts and subject to such powers and pro-"visions as the court may deem expedient", but the wording of sub-s. 5 has to be examined in order to ascertain whether it is necessary in any particular case to reserve a power of appointment or revocation or otherwise provide for the possibility of the lunatic recovering capacity. The construction contended for by the applicant seems to me to put prima facie an extended meaning upon the word "otherwise"; but, having read *In re Greene* (8), to which reference has been made, and having observed the admission by counsel for the applicant in that case, that under s. 171 there was no jurisdiction to order capital to be handed over during the life of the lunatic, I cannot think that the decision of the court, which had express reference to s. 171, could be treated as per incuriam because sub-s. 5 is not expressly mentioned. Indeed, the language of Lawrence, L.J. (9), appears to indicate that he had the actual words of sub-s. 5 in mind when he said: "I agree . . . that, as the patients are amply provided "for otherwise, there is no need to make any provision in the "proposed settlement for the maintenance of the patients out of "the settlement funds, and that the power of appointment pro"posed to be conferred on the applicant can properly be made to "operate both on the capital and on the income of the settled "funds immediately on the death of the applicant". That was taking away from the patients the power of dealing with the property in the event of the patients recovering.

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(8) [1928] Ch. 528.

In this case the patient is amply provided for and, indeed, as has been pointed out, by the effect of this scheme her income position will be very slightly altered, and in a sense it is altered to her advantage. I agree that the proposed order should be made, under s. 171 and not under the inherent jurisdiction of the court.

SOMERVELL, L.J. It is suggested that the best procedure is that when you have settled the final form of the order you should submit it to the master in the first instance and then either he will submit it to Hodson, L.J., who was originally dealing with the matter, or, if any question arises, we shall have to consider it. The costs of the application and the costs subsequently incurred until the order is finally drawn up will be paid out of the capital of the patient.

Application granted.
Order accordingly.

Solicitors: *Eland, Nettleship & Butt; Bull & Bull; Official Solicitor.*

A. W. G.

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(9) [1928] Ch. 528, 563.

C. A.

1951
July 10, 11.

Somervell,
Denning and
Hodson, L.JJ.

CRISTEL *v.* CRISTEL.

Practice and Procedure—Husband and wife—Occupation by wife of matrimonial home—Possession sought by husband—Agreed order for possession, suspended subject to conditions—"Liberty to apply"—Meaning—No power of court to vary order—Question raised by application not connected with working out of order—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

A husband, who had deserted his wife, applied by summons under s. 17 of the Married Women's Property Act, 1882, for possession of the matrimonial home, which was in the occupation of the wife and the children of the marriage, and which he wished to sell with vacant posssession. By agreement between the parties a master made an order`for possession, but suspended it until the husband provided suitable alternative accommodation in the form of a two- or three-bedroomed house or bungalow. The order also gave "Liberty "to apply". Subsequently the husband, having secured a two-bedroomed flat, applied by summons to the master to vary his order by inserting the words "or flat" after the word "bungalow", and to order the wife to give up possession of the house. The master refused the application, but, on appeal, Devlin, J., in chambers, referred back to the master the question whether the flat was suitable alternative accommodation. On appeal by the wife:—

Held, that the words "Liberty to apply" referred prima facie to the working out of the actual terms of the master's order, that the word "house" did not cover a flat, and the insertion of the words "or flat" would amount to a variation of the order; and that in the absence of any change of circumstances the judge had no power to vary the order of the master.

Per Hodson L.J.: *Quære*, whether a change of circumstances would justify an application for variation of the order.

Dictum of Stirling L.J. in *Poisson & Woods* v. *Robertson & Turvey* (1901) 50 W. R. 260, applied.

Abbott v. *Abbott* (1930) 47 T. L. R. 207 (C. A.) 222, distinguished and dictum of Langton, J., at p. 209, disapproved.

APPEAL from Devlin, J.

The plaintiff husband, who had left his wife and had had a magistrate's order for maintenance made against him, wished to obtain possession of the matrimonial home, 26 Ilmington Road, Kenton, in which the wife and the children of the marriage were still residing, so that he might sell the house with vacant possession. He accordingly started proceedings for that purpose by summons under s. 17 of the Married Women's Property Act, 1882 (1), and on July 21, 1949, a master, by agreement between the parties, made an order for the wife to deliver up possession, but suspended the order until the husband provided "suitable "alternative accommodation . . . by providing a two- or three-"bedroomed house or bungalow in the Harrow area, either by "renting the same unfurnished or by purchase, the applicant "agreeing to pay the expenses of removal. Liberty to apply".

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(1) Married Women's Property Act, 1882, s. 17: "In any question "between husband and wife as to "the title to or possession of pro-

On December 5, 1950, the husband, by summons, again applied to the master to vary his order of July 21, 1949, by inserting the word "flat" after the word bungalow, and to order the wife to deliver up possession of the house, he (the husband) having secured a two-bedroomed flat as alternative accommodation.

The master refused the application, and the husband appealed to Devlin, J., who on May 24, 1951, in chambers, ordered that the question whether the alternative accommodation offered was suitable should be referred to a master for determination; that if the determination were in the affirmative so much of the order of July 21, 1949, as provided for delivery by the wife of possession should be suspended for such time as the master thought fit for the purpose of allowing the wife to move out; and that if the determination were in the negative the order for possession should be suspended until further order. Liberty to apply.

The wife now appealed.

P. Goodenday for the wife. The words "Liberty to apply" are procedural only and are intended to facilitate the working out of the order by keeping alive the power of the court should the circumstances change. The order here was a final one, and the judge had no jurisdiction to vary it. The issue was whether or not the husband had a right to possession, and that was decided by agreement between the parties.

On its proper construction the word "house" does not include "flat". If it had been intended that "house" should include "flat" it would not have been thought necessary or desirable to insert the words "or bungalow" after "house". The effect of the order of the judge was to vary the order of the master, and he had no power to do so.

"perty, either party . . . may apply "by summons or otherwise in a summary way to any judge of the "High Court in England . . . or in England to the judge of the county "court . . . and the judge . . . may "make such order with respect to the "property in dispute . . . as he thinks "fit, or may direct such application "to stand over from time to time, "and any inquiry touching the matters in question to be made in such "manner as he shall think fit . . .".

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A. Hoolahan for the husband. This was an order for possession, suspended until suitable alternative accommodation was provided. It therefore could not be a final order. The fact that the parties had consented to the master's order could not deprive the master or the judge of their discretion under s. 17 of the Act of 1882. Obviously the husband, having found alternative accommodation, must return to the master and ask for possession. The insertion of the words " Liberty to apply " in this context must mean liberty to come back to the court and ask the master or judge to exercise his discretion and grant an order for possession.

Abbott v. *Abbott* (2) is relied on. " Liberty to apply " is for general use. " The expression means what it says, namely, that " leave was reserved to both parties to make any application " concerning any part of the order at any subsequent time " (*per* Langton, J.). " House " includes " flat ", and in the Oxford dictionary is described as a portion of a building occupied by one tenant or family.

Somervell, L.J. The circumstances which led to the husband's taking out the summons were briefly these: he had left the matrimonial home, and his wife was there with two children. We were told that it was a larger house than was necessary for the wife and the two children. The husband was in financial difficulties and he wanted to be able to get possession of the house so that he could sell it with vacant possession.

As a result of the summons, there was on July 21, 1949, a consent order that the wife " do deliver up possession of 26 " Ilmington Road, Kenton, in the County of Middlesex, to the " [husband], but that such order be suspended until the [husband] provides suitable alternative accommodation for the " [wife] by providing a two- or three-bedroomed house or bungalow in the Harrow area, either by renting the same unfurnished " or by purchase, the [husband] agreeing to pay the [wife's] " expenses of removal. No order as to costs. Liberty to apply ".

On December 5, 1950, the husband took out a summons asking that that order should be varied, and for an order " That the " [wife] deliver up possession of 26 Ilmington Road, the [husband] having secured a two-bedroomed flat at Copthorn Court, " 347 Alexandra Avenue, Harrow, Middlesex, as alternative " accommodation ". That came before the master, who refused to vary the order by inserting the words " or flat " after the words " or bungalow ".

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(2) (1930) 47 T. L. R. 207, 209.

There was then an appeal to Devlin, J., in chambers. The order of the judge as drawn up may be said to be ambiguous, because it directed that the question whether the accommodation offered by the husband, as set out in an affidavit, which no doubt stated that it was a flat, is suitable alternative accommodation " be referred to a master for determination, and that if such " determination be in the affirmative, so much of the order as " orders possession shall be suspended for such time as the master " shall think fit for the purpose of allowing the respondent to " move out ". However, it seems to me reasonably plain that the judge proceeded on the basis that the order could be varied as asked for in the summons. He was not, as a matter of construction, deciding that the word " house " in the original order covered " a flat ".

On that point I have come to the conclusion that one cannot construe the word " house " in the original order as including " flat ". I think that the fact that it was thought necessary to insert the words " or bungalow " indicates that " house " cannot be given a wide meaning, such as any premises in which a woman with two children can live, but must be construed in its ordinary sense; and no doubt those who advised the husband to take out the summons which I have read took that view.

The question therefore is whether the order can be varied as asked. If it can, the question will then arise whether it should be; but the first question is whether it can, and reliance is placed by the husband on the words " Liberty to apply ".

Prima facie, " Liberty to apply " is expressed, and if not expressed will be implied, where the order drawn up is one which requires working out, and the working out involves matters on which it may be necessary to obtain the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied.

In *Poisson and Woods* v. *Robertson and Turvey* (3) the facts were rather complicated. They concerned a secret remedy for, I think, drunkenness, in which the various parties claimed rights. One of the claims made by the plaintiffs was to inspect the recipe or to have the document handed over to them. The report says that the trial judge gave no decision, which, I presume, means he did not actually refer to it in his judgment; but he certainly made no order for inspection or possession. There was "Liberty to apply", and it was sought to make an application under those words for a copy of the document. I think that the original had been destroyed.

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(3) (1901) 50 W. R. 260, 261.

In his short judgment in this court Stirling, L.J., said: "The present application could not be made under 'Liberty to "'apply'. The judgment contained a declaration as to the "interests of the parties with 'Liberty to apply', but the "addition of those words did not enable the court to deal with "matters which did not arise in the course of working out the "judgment". That phrase "working out the judgment" can be found in other cases.

Mr. Hoolahan mainly relied on *Abbott* v. *Abbott* (4) in which, as here, a consent order had been drawn up. The subject-matter of the order was alimony pendente lite. The husband, after it had been running for some time, applied to have it reduced. It seems to have worked out at a very high proportion (or so he said) of his income, and he had become ill and had medical expenses, and so on. The argument was of the type which arises under maintenance orders where one party or the other is saying that the financial circumstances have changed and that therefore the sum ought to be increased or diminished.

Various arguments were put forward. One was that the order was in form and in fact a final order, by which obviously was meant that it should be construed as an order made by consent between the parties settling alimony pendente lite finally and irrevocably for the period down to the suit. The order, as in the present case, had at the end the words "Liberty to apply".

On the other side it was submitted that it should not be treated as a final order, and that the expression "Liberty to "apply" in itself negatived, or assisted in negativing, that construction.

It was held that the order could be varied, and the amount payable under it was reduced as from the date of the summons, or, possibly, from the appeal from the master. In the Court of Appeal, Lord Hanworth, M.R., said that there was no necessity for him to discuss the questions of law which had been suggested, and that he did not think that the consent order made was a final order in the way contended for by the petitioner. He thought that Langton, J., had taken the right view of the facts of the case.

It seems to me that that was a decision which must be restricted to its subject-matter or similar subject-matters and that what the court decided was that that particular consent order, with the words "Liberty to apply" was not a final and irrevocable order, but was one which, on its true construction, the parties contemplated and agreed could be varied if a change in financial circumstances came about; that is to say, on the principles which are very familiar to everybody in respect of maintenance orders.

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(4) (1930) 47 T. L. R. 207, 222.

I think, with respect, that Langton, J., in his judgment below, in discussing these words "Liberty to apply", used language which goes beyond what was necessary for the decision of that case, having regard to the way in which it was dealt with by Lord Hanworth. Langton, J., said (5): "The expression 'Liberty to apply' means what it says, namely, that leave "was reserved to both parties to make any application concerning "any part of the order at any subsequent time". I think that that is too wide a statement. As I have said, prima facie the words "Liberty to apply" refer, in my opinion, to the working out of the actual terms of the order.

In the present case, I have come to the conclusion that the words "or flat" cannot be inserted. It is a plain alteration of what had been agreed. No change of circumstances such as was put forward in *Abbott's* case (6) is suggested. It is an attempt by the husband to enlarge the categories of alternative accommodation which were expressly limited by the order.

Mr. Hoolahan, in addition to relying on *Abbott* v. *Abbott* (6) (which I do not think assists here for the reasons which I have given), submitted that to refuse this application was in effect to take away from the master and judge the discretion which is conferred on them by s. 17 of the Married Women's Property Act. I do not think that a good argument. The section, of course, confers a wide power on the judge or the court to postpone matters or to reserve power to deal with them as they arise from time to time; but if parties do in fact agree an order, or, indeed, whether they do or not, once an order is made of this kind, it cannot be altered, or, at any rate, it would only be in a very exceptional context that the words "Liberty to apply" could justify an alteration. The question, really, of the discretion which is conferred by s. 17 does not arise.

I wish to say in conclusion that this is the type of order, on the construction which I have given to it, in which one would

(5) 47 T. L. R. 207, 209.

(6) 47 T. L. R. 207.

have expected the parties to ask for the words "Liberty to apply" to be inserted. It is quite true that, where an order requires working out, those words will be implied; but it is very usual, as we all know, for counsel, when an order does require working out, to ask that these words should be inserted. On the face of the order obviously a dispute might arise whether the accommodation offered was suitable alternative accommodation. If that happened, then the court would have to provide how that dispute could be resolved; but, for the reasons which I have given, I think that this appeal must be allowed and the order of the master restored.

DENNING, L.J. I agree. If there were an unforeseen change of circumstances, for instance, if the wife were left by will another house, or if she took an adulterer to live with her in this house, I should have thought that the "Liberty to apply" would enable the court to remedy the position. *Abbott* v. *Abbott* (7) would appear to be sufficient authority for that. But when there is no change of circumstances, I do not think that the court can alter or vary the agreement of the parties under the "Liberty to "apply". It can only do what is necessary to carry the agreement into effect. I agree that the appeal should be allowed.

HODSON, L.J. I agree that the appeal should be allowed and the order of the master restored. The words "Liberty to apply" in their context add nothing to the order, which, of itself, required something further to be done for it to be worked out. Therefore, without the existence of those words, it would have been open to the husband to come to the court and show that he had provided suitable alternative accommodation in the form of a two- or three-bedroomed house or bungalow; but, for the reasons which have been given by Somervell, L.J., I am of opinion that it is not open to him to come and ask the court to alter the agreement by adding the words "or flat" to the description of the accommodation contained in the order.

I should prefer to reserve my opinion on the question whether a change of circumstances would enable an application to be made.

Appeal allowed.
Order of master restored.

Solicitors: *Osmond, Bard & Westbrook; Irwin Shaw.*

A. W. G.

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(7) 47 T. L. R. 207.

C. A.

1951
May 24.

Evershed, M.R., Denning, L.J., and Roxburgh, J.

KEANE *v.* CLARKE.

[Plaint No. F. 1765]

Landlord and Tenant—Standard rent—Admitted proof by tenant of first letting after September 1, 1939—*Onus on landlord to prove standard rent—Rent of first letting after September* 1, 1939, *as standard rent.*

In 1949, a flat was let at a weekly rent of 35*s.* to a tenant who, after the tenancy was determined, brought proceedings against the landlord claiming that she had paid excessive rent as the standard rent was only 22*s.* 6*d.* a week. The tenant proved that the rent of 22*s.* 6*d.* was paid by one tenant, W., from May, 1944, to 1945, and by another tenant from Easter, 1946, to November, 1949, subject only to an increase to 23*s.* 6*d.* a week by reason of an increase in the rates. No evidence relating to any previous letting was given by either party.

The county court judge held that the onus was on the tenant as plaintiff to prove that she had paid rent in excess of the standard rent, and that she had not discharged that onus in the absence of evidence that there had been no letting on or before September 1, 1939, or before the letting to W. On appeal:—

Held, (1.) that in the first instance the onus was on the tenant to bring evidence before the court from which the rent legitimately chargeable would be inferred, but (2.) that the facts given in evidence led to the inference that either the letting in 1944 was the first letting or that the rent at which the premises were then let was the standard rent, and therefore the tenant had discharged that onus and established a prima facie case, and as no attempt had been made by the landlord to displace that prima facie case, the tenant had established that 23*s.* 6*d.* was the rent which the landlord was entitled to charge during the period of her tenancy.

Veale v. *Cabezas* [1921] W. N. 311 and *Bolger* v. *Daly* [1925] 2 I. R. 42 approved and applied.

Per Denning, L.J.: Ever since 1938 it has been the duty of a landlord in the case of a dwelling-house within the Rent Restriction Acts to provide a rent-book and to insert in that book a statement of what the standard rent was. Here the landlord knew that he had been receiving a weekly rent of 23*s.* 6*d.*, and there could be no justification for increasing it to 35*s.* a week.

APPEAL from Judge Done sitting at Clerkenwell county court.

On November 11, 1949, the plaintiff orally agreed with the defendant to become a tenant of the first-floor flat of 11 Park Avenue, North Hornsey, at the weekly rent of 35*s.* payable in advance each Saturday. The rent was paid until September 23, 1950, the date on which notice to quit expired. She only gave up possession of the flat on October 26, 1950, paying no rent meanwhile, but she brought proceedings claiming that the standard rent had been 22*s*. 6*d*. and that on that footing she had overpaid rent to the extent of 23*l*. 9*s*., being 28*l*. 15*s*. overpayment to September 23 less rent left unpaid from September 23 to October 26, 1950. The landlord contended that the standard rent was 35*s*. a week and counterclaimed for 8*l*. 5*s*. in respect of arrears of rent and for 23*l*. 10*s*. in respect of damages for waste.

The landlord based his contention as to the standard rent on a claim that a Mrs. Urry had occupied the flat with one less room than the plaintiff tenant at a rent of 22*s*. 6*d*., subsequently increased to 23*s*. 6*d*. by reason of an increased rate, and that the value of the extra room had increased the standard rent payable by the plaintiff tenant to 35*s*. a week.

At the hearing before the county court judge it was shown to have been admitted between the respective solicitors that one Woods had been tenant of the rooms of the flat from May, 1944 to 1945, at the weekly rent of 22*s*. 6*d*.; and in cross-examination the landlord admitted that Mrs. Urry had occupied the same rooms from Easter, 1946, to November, 1949, at the same rent, apart from the increase to 23*s*. 6*d*. already mentioned.

The judge, however, gave judgment dismissing the tenant's claim on the ground that it was for her, as tenant, to prove the standard rent. That was fixed by reference to the rent at which, if the premises were unlet on September 1, 1939, or before that date, they were first let after that date. There was no evidence that the first letting after September 1, 1939, was to Woods and the plaintiff had therefore failed to discharge the onus upon her. He therefore gave judgment against the tenant on the landlord's counterclaim for 8*l*. 5*s*. for rent due and for 8*l*. 2*s*. damages for waste. The tenant appealed in regard to the standard rent but not in regard to waste.

Bernard Lewis for the tenant. The county court judge was in error in refusing to accept 22*s*. 6*d*. as the standard rent. The tenant had established that there had been a letting to Woods at 22*s*. 6*d*. a week, and there was no evidence of any earlier letting. That was accepted on behalf of the landlord, as also the subsequent letting to Mrs. Urry at 22*s*. 6*d*. a week increased to 23*s*. 6*d*. by reason of an increase in the rates. It is submitted that the court will accept the first letting established before it as determining the standard rent.

It is enough that a letting to Woods was established followed by a letting to Mrs. Urry at the same weekly rent of 22*s*. 6*d*. only increased by a shilling for the reason stated. That this is enough to establish the standard rent receives support from *Veale* v. *Cabezas* (1) followed in *Tarrant* v. *Burston* (2) and supported by the Irish case, *Bolger* v. *Daly* (3). [He referred also to *Vaughan* v. *Shaw* (4), and was stopped.]

McKinnon for the landlord. Schedule I to the Rent Restriction Act of 1939 (which amended s. 12, sub-s. 1, of the Act of 1920) lays down the standard rent in the case of a house to which the Act of 1939 applies. It is established by the letting on September 1, 1939, or, in default, the last letting before that date; and it is only in default of any such letting that regard must be had to the first letting after September 1, 1939. The tenant has failed, however, to prove that the letting to Woods was the first letting after September 1, 1939. That is the onus on the tenant, for she has brought proceedings to recover the rent overpaid.

[DENNING, L.J. Why is the letting to Woods not to be taken as establishing the standard rent?]

Because there may well be earlier lettings which the tenant ought to prove. The Act lays down the mode of ascertaining the standard rent. It is submitted that the county court judge was right in saying that the burden was on the tenant to establish the standard rent: see *Davies* v. *Warwick* (5). It has to be shown (1.) that there was a letting, and (2.) that it was the first letting after September 1, 1939.

[DENNING, L.J. Surely it is for the landlord to show in the rent-book what the standard rent was? There could be no justification in showing the rent payable by the plaintiff at 35*s*. a week without establishing a reason for it.]

The tenant is not here bringing proceedings to establish the standard rent but to recover rent overpaid.

Lewis replied.

EVERSHED, M.R. [after stating the facts:] This much is clear, that there was no evidence whatever of any letting of the premises at any time before the letting to Woods on May 27, 1944; and counsel on both sides have conceded in this court, as I understand they conceded in the court below, that this flat is what is known as a new-control dwelling-house by virtue of the Rent Restriction Act of 1939. The standard rent is there defined as being the rent at which the premises were let on September 1, 1939, or, if not then let, the rent at which they were last let before that date, or, if not let before that date, the rent at which they were first let after that date.

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(1) [1921] W. N. 311.

(2) [1934] Estates Gazette Digest 142.

(3) [1925] 2 I. R. 42.

(4) [1945] 2 K. B. 400, 402.

(5) [1943] K. B. 329.

As Mr. McKinnon has pointed out, this is, after all, not an application to fix the standard rent, but a claim to recover rent overpaid; so that it is for the plaintiff tenant to establish to the court's satisfaction that the rent which she paid was in excess of the rent which the landlord was entitled to charge; and to do that she must bring evidence before the court from which the rent legitimately chargeable can properly be inferred.

The county court judge, in the short judgment signed by him and in the note of the judgment which Mr. McKinnon read to us, clearly took the view that a tenant who was only able to prove a letting of the premises in suit at a date after September, 1939, but who could not prove whether the premises were let on September 1, 1939, or at a date before then, necessarily, as I follow him, failed to make good the claim. "I held", he said, "that the onus was on the [tenant] to prove that she had paid "rent in excess of the standard rent, and that as she had failed "to call evidence sufficient to enable the court to determine the "standard rent, she had not discharged that onus."

With great respect to the county court judge, I think that he imposed too heavy a burden on the tenant. Of course, in all matters of evidence each case must depend upon the materials put before the court. There was here evidence of the letting to Woods in May, 1944; there was evidence that the rent of 22*s*. 6*d*. a week then paid and afterwards paid by Mrs. Urry, plus the shilling increase made in respect of rates, continued until the present tenant went into occupation in 1949, when the landlord seized the opportunity to raise the rent of 23*s*. 6*d*. to the extent of 11*s*. 6*d*. It is true that no evidence was called by the tenant or by anyone else relating to any letting previous to that to Woods. The county court judge, according to Mr. McKinnon's note, seems to have thought it was for the tenant to produce as a witness the former landlord, one Williams. That seems to me altogether too severe a burden on a tenant in cases of this kind. On the other hand, the landlord and his wife led some evidence as to the previous history of these premises. The landlord, indeed, went further in that by his particulars—I do not suggest that they conclusively bind him—he inferentially stated that the standard rent before the addition which he made was 22*s.* 6*d.* and no more.

What then, I ask myself, is the proper inference which the court should draw from the materials laid before it? I think that the proper inference is that the standard rent of these premises was 22*s.* 6*d.*; but I think also that the permissible rent should be treated (and, indeed, Mr. Lewis concedes this) as 23*s.* 6*d.* It seems to me from the evidence given that the inference must be either that, in the absence of any evidence of previous lettings, the letting to Woods should be treated as the first letting of these particular premises, or that the figure at which the premises were let to Woods should be treated as the permissible, or standard, rent.

In taking that view I find some support from the decisions which have been cited by Mr. Lewis, decisions to which the judge in the court below did not have the advantage of being referred. In *Veale* v. *Cabezas* (6) two questions arose, first, whether for the purpose of assessing the standard rent regard should be had to the sum of the rents at which portions of the premises had been let at the material date, or to the first letting of the premises as a whole. To that question the answer was in favour of the second alternative—a point with which we are not concerned here. But in addition the point was made that there was no evidence to show that any relevant rent had been charged in respect of the premises on or before the then relevant date, August 3, 1914, the only evidence being the letting to the defendant at a date very much later. As regards that point, the Divisional Court, which allowed an appeal from the county court, said: "As to the period before August 3, 1914, there was no "evidence that the house had been let before that date at any "rent other than the ground rent. The house was first let after "that date to the defendant at the rent of 23*s.* a week, and that, "in the circumstances, was therefore the 'standard rent'".

That, I think, affords some support for the view that in the absence of evidence of previous lettings an inference can be drawn as to the figure of the standard rent from evidence of a later letting. That case is not, of course, binding on this court, but it has stood unchallenged for the period of a generation, and in these Rent Act matters many persons may well have regulated

(6) [1921] W. N. 31.

their affairs in accordance with decisions of the court in those days. I should therefore, unless I felt disinclined on principle to accept it, be very much against casting doubt upon it at this date.

The Irish case equally, of course, does not bind us, but the point raised was, again, of a similar character. In the course of the leading judgment in the Supreme Court, Kennedy, C.J., said (7): " The application of the Act depends on whether the " standard rent or the valuation is within the maximum limit " prescribed by the statute in defining the premises to which it " applies. No evidence as to valuation is before this court, nor " was any such evidence given before Johnson, J.; and the case " is, therefore, further narrowed down to a question as to whether " there is evidence that the standard rent was such as to bring " the premises within the Act. The letting to the defendant was " proved. Under that letting he was given vacant possession on " November 1, 1918, and he was to hold from that date at a rent " of 50*l*. a year. If that figure represents the standard rent, the " tenancy was within the Act. No evidence as to any previous " letting of the premises having ever been made was given on " the part of either party.

" It was contended on the part of the plaintiff that the onus " was upon the defendant of showing whether or not the premises " were let on August 3, 1914, and, if not then let, when they " were first let after that date, and whether such letting was at a " rent within the prescribed limits of application of the statute, " and, if so, what was the amount of the standard rent according " to the definition in the statute.

" Now, on the evidence before the court in this case, we find " a letting of the premises made on November 1, 1918, which, no " earlier letting having been proved, appears to be a first letting, " and at a rent within the limits of application of the Act which " gives us the statutory ' standard rent '. In my opinion, in that " state of facts, the onus rested on the plaintiff to displace the " prima facie case made by the defendant bringing the premises " within the Act. No attempt has been made by the plaintiff " to displace that prima facie case. We must, therefore, assume " that the premises were let at a standard rent within the Act, " namely, 50*l*. a year, from which it follows that the decision of " the learned judge at the trial cannot be sustained ".

I may say that the action was one whereby the landlord sued the tenant for rent of a dwelling-house, and the tenant's defence was that the rent charged was in part irrecoverable.

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(7) [1925] 2 I. R. 42, 46.

I accept that reasoning, and think that it should be applied to this case. I agree with Mr. McKinnon that the onus in such an action as this lies in the first instance on the tenant, but I think that in the circumstances she discharged it and established a prima facie case, and that (to quote the Irish Chief Justice) "No attempt has been made by the [landlord] to displace that "prima facie case".

In those circumstances, I think that the court must draw the inference that 22*s*. 6*d*. was the standard rent, and that 23*s*. 6*d*. was the rent which the landlord was permitted to charge the tenant during the period of her tenancy. This appeal should be allowed and the tenant ought to recover the difference between the rent that she in fact paid, of 35*s*. a week, and the rent which she ought lawfully to have been charged, namely, 23*s*. 6*d*. a week, during the relevant period.

DENNING, L.J. I agree. If the county court judge had had the authorities before him, he would, I am sure, have decided differently. Ever since 1938 it has been the duty of a landlord, in the case of a house within the Rent Restriction Acts, to provide a rent-book, and to insert in that rent-book a statement of what the standard rent is. That shows that it is the duty of the landlord to find out what the standard rent is, and to tell it to the tenant. That is good sense, because the landlord is in a much better position than the tenant to know it. The matter can be tested by asking this question: when the landlord issued a rent-book to the tenant in November, 1949, what figure ought he to have inserted as the standard rent? He knew that he himself, ever since he bought the house, had been receiving 23*s*. 6*d*. rent, which included an increase in respect of rates. If he had made a few inquiries, he would have found that ever since May, 1944, the rent had been 22*s*. 6*d*., and had been increased by a shilling to 23*s*. 6*d*. on account of an increase in rates. On that information, what was the figure which he should have inserted in the rent-book as the standard rent? There is only one answer possible: 22*s*. 6*d*.

Mr. McKinnon's contention leads logically to the conclusion that the landlord could have inserted in the rent-book any figure he chose as the standard rent, for he says that, because there is no evidence of the rent at which the house was let in 1939, it is impossible to say the 35*s*. is wrong. That is obviously untenable. On the facts in evidence in this case the proper inference was that the standard rent was 22*s.* 6*d.* unless the landlord could prove that it was some other figure; and this he failed to prove. I therefore agree that the appeal should be allowed.

Roxburgh, J. I also agree.

Appeal allowed.
Judgment for plaintiff for 20l. 18s.,
less 8l. 2s. damages for waste.

Solicitors: *Vincent & Vincent; Craigen, Hicks & Co.*

H. C. G.

HARLING *v.* EDDY.

[Plaint No. G.5]

C. A.
1951
May 24, 25.

Evershed, M.R., Denning, L.J., and Roxburgh, J.

Sale of goods—Warranty—Sale by auction—Oral assurance of a vendor as to condition of heifer—Whether condition or warranty—Printed conditions of sale excluding any warranty not in writing—Heifer's death from tuberculosis—Right of buyer to damages.

The defendant put up a heifer for sale by auction. Condition 12 of the printed conditions of sale provided: "No animal, article or "thing is sold with a 'warranty' unless specially mentioned at "the time of offering, and no warranty so given shall have any legal "force or effect unless the terms thereof appear on the purchaser's "account". There being no bid for the heifer when she appeared in the auction ring, the defendant stated that there was nothing wrong with her and that he would take her back if she turned out not to be as he said she was. Bidding thereupon started and the heifer was knocked down to the plaintiff. The heifer's condition at once proved unsatisfactory, and some three months later the plaintiff wrote to the defendant to take her back. The defendant did not reply. The heifer died of advanced tuberculosis a month later. On the plaintiff's claim for damages:—

Held (by Evershed, M.R., and Roxburgh, J., *per* Denning, L.J., *semble*) that the statement made by the defendant at the auction amounted to a condition, and was therefore unaffected by condition 12 which related solely to warranties, and the fact that the plaintiff claimed damages for the breach of the condition, and so treated the condition as if it were a warranty, did not affect the position.

Wallis, Son & Wells v. *Pratt and Haynes* [1911] A. C. 394 followed.

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Held, further, on the assumption that the statement made by the defendant at the auction amounted merely to a warranty, that the warranty overrode the provisions of condition 12 and the plaintiff was entitled to succeed.

Couchman v. *Hill* [1947] K. B. 554 followed; *Hopkins* v. *Tanqueray* (1854) 15 C. B. 130 explained and distinguished.

Per Denning, L.J.: If a seller of goods by auction gives an express oral warranty, he cannot escape from his responsibility for it by saying that the catalogue contained an exempting clause. If a person wishes to exempt himself from a liability imposed on him at common law, he can only do it by an express stipulation brought home to the party affected and assented to by him as part of the contract. The party who is liable at law cannot escape liability by simply putting up a printed notice or issuing a catalogue containing exempting conditions: he must go further and show affirmatively that it was a contractual document and was accepted as such by the party affected.

Appeal from Judge Neal sitting at Ashford (Middlesex) county court.

The defendant, Robert Eddy, put up for sale by auction at Ashford Cattle Market on June 30, 1950, a Guernsey heifer. Condition 12 of the printed conditions of sale provided: "No "animal article or thing is sold with a 'warranty' unless "specially mentioned at the time of offering, and no warranty so "given shall have any legal force or effect unless the terms "thereof appear on the purchaser's account". When the heifer appeared in the auction ring, owing to her unpromising appearance no one made a bid. Thereupon the defendant said that there was nothing wrong with the heifer, that he would absolutely guarantee her in every respect, and that he would be willing to take her back if she turned out not to be what he stated she was. Bidding for the heifer then began, and she was knocked down to the plaintiff, Ronald George Harling, for 65*l*. 2*s*. The plaintiff was worried about the heifer from the start. He called in a veterinary surgeon who stated that she was suffering from indigestion. She did not respond to treatment, and her milk yield fell from 2½ gallons a day in July to 1 gallon in September. On September 21, the plaintiff wrote to the defendant that, since the heifer had completely wasted away and her milk yield had dropped to one gallon, he proposed to return her. He received no answer to that letter. He wrote again on October 10 and again received no answer. On October 30 he wrote to the defendant that the heifer had died from advanced tuberculosis.

In these proceedings he claimed 67*l*. 14*s*. 6*d*., the price of the heifer, and in addition 2*l*. 12*s*. 6*d*. paid for veterinary fees. The county court judge gave judgment for the plaintiff for the total amounts claimed. The defendant appealed.

F. S. Laskey for the defendant. The county court judge's decision was wrong. The statement which the defendant made at the auction amounted to a warranty only and not to a condition. Accordingly, since the terms of condition 12 were not complied with, the plaintiff cannot rely on the defendant's oral warranty. In any event, three months having elapsed between the auction and the plaintiff's taking any objection to the heifer's condition, he has lost his right to damages: see *Wallis, Son & Wells* v. *Pratt & Haynes* (1). If the plaintiff intended to claim damages by reason of the heifer's condition, he should have done so within a reasonable time after the auction. Three months was not such a time. The plaintiff relies on *Couchman* v. *Hill* (2), but that decision is distinguishable; and it should not be followed since the earlier decision of *Hopkins* v. *Tanqueray* (3) was not then cited to the court. If it had been cited, it is probable that the court would have reached a different decision in *Couchman* v. *Hill* (2).

It is further submitted that the county court judge assessed the damages on the wrong basis. He should have made an allowance in respect of the milk which the plaintiff had obtained from the heifer before she died.

K. G. Jupp, for the plaintiff, was not called upon to argue.

EVERSHED, M.R. [after stating the facts]. The real question is whether the statement which the defendant made at the sale immediately before the bidding entitles the plaintiff now to say that the animal was not, as the defendant stated her to be, sound in every respect, and that he now takes advantage of the offer which the defendant made and claims from the defendant the price paid for the animal, or equivalent damages. The real difficulty arises from the circumstance that condition 12, prima facie, seems intended to render nugatory any mere warranty given at the sale. The first answer, in my judgment, to the defence based on condition 12 is that, in the circumstances, this statement by the defendant was a condition.

It has been said many times, and particularly in *Wallis, Son & Wells* v. *Pratt & Haynes* (4), that whether any statement is to

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(1) [1911] A. C. 394.
(2) [1947] K. B. 554.
(3) (1854) 15 C. B. 130.
(4) [1911] A. C. 394.

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be regarded as a condition or a warranty must depend upon the intention to be inferred from the particular statement. A statement that an animal is sound in every respect would, prima facie, be but a warranty; but in this case the judge quite clearly found as a fact that the defendant went further: he promised that he would take the animal back if she were no good. Nor is it to be passed over without comment that, when the plaintiff suggested in his letters in September and October that the defendant should take the heifer back, the defendant never chose to challenge the suggestion.

The defendant's statement having, therefore, included words to the effect, "If there is anything wrong I will take it back", it seems to me quite plain that the words which he used could not have been intended merely as a warranty; for a warranty would give no right of rejection to the purchaser. The final words involve necessarily a right in the purchaser to reject, that is, to return the animal; and they convert the statement, to my mind, from a warranty into a condition.

If, then, it is a condition, what would be the right of the plaintiff? Mr. Laskey has argued forcibly that the plaintiff must at least exercise his right of rejection in due time. He plainly purported to do so on September 21, when he called upon the defendant to take the animal back. In my judgment, in the circumstances of the case, the period between July 1 and the middle of September would not be unreasonable; but, however that may be, it is plain also from *Wallis, Son & Wells* v. *Pratt & Haynes* (5) that a person entitled to the benefit of a condition, as was the plaintiff here, can turn the condition, in effect, into a warranty by claiming damages as for breach of warranty instead of his exercising his right of rejection. By the time this claim had been formulated, the animal was dead, and the plaintiff could, in truth, not do otherwise than he has done here—namely, to claim damages; and in my judgment he was entitled to treat the condition to that extent as though it were a warranty.

If that is right, the question still remains whether condition 12 of the condition applies. In my opinion, the answer is No. Condition 12 is limited in its terms to a statement which is a mere warranty and is not a condition, and the second part of it, ". . . and no warranty so given shall have any legal force "or effect . . ." can only refer to the warranty previously

(5) [1911] A. C. 394.

mentioned, namely, a statement which is a warranty and no more. In other words, condition 12 cannot be relied on by the defendant to defeat the right of the plaintiff to sue for damages for the breach of the condition.

But since this matter is of some importance and has been forcibly put to us by Mr. Laskey, I think it desirable also to express a view upon the conclusion properly to be reached if this statement were a warranty merely. On that aspect of the matter I derive considerable assistance from the case in this court of *Couchman* v. *Hill* (6), where a heifer was sold under the description of " unserved ". There was a special condition in the auction particulars: " The lots are sold with all faults, imperfec- " tions, and errors of description, the auctioneers not being " responsible for the correct description, genuineness, or authen- " ticity of, or any fault or defect in any lot, and giving no " warranty whatever ".

In that case, as in this, there was a certain nervousness in regard to the particular animals offered, and when they were in the ring the plaintiff, the buyer, asked both the seller and the auctioneer: " Can you confirm that these heifers are unserved? ", and both replied affirmatively to that question. It later transpired that one of the heifers so purchased was not unserved, but died from a miscarriage through the strain of carrying a calf at too young an age for breeding. The plaintiff sued for damages, and the defendant, the owner, relied, among other things, upon the condition which I have read.

In that case the plaintiff's question and the answer to it amounted to a warranty and no more. Scott, L.J., in giving the leading judgment, expressed himself thus (7): " The real question " is, what did the parties understand by the question addressed to " and the answer received from both vendor and auctioneer. It " is contended by the defendant that the question meant ' having " ' regard to the onerous stipulations which I know I shall have " ' to put up with if I bid and the lot is knocked down to me, can " ' you give me your honourable assurance that the heifers have " ' in fact not been served? If so, I will risk the penalties of " ' the catalogue '. The alternative meaning is: ' I am frightened " ' of contracting on your published terms, but I will bid if you " ' will tell me by word of mouth that you accept full respon- " ' sibility for the statement in the catalogue that the heifers have

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(6) [1947] K. B. 554; [1947] 1 All E. R. 103.

(7) [1947] K. B. 554, 558.

" 'not been served, or, in other words, give me a clean warranty. " 'That is the only condition on which I will bid' "; and the Lord Justice decided, on the facts of that case, that it was clear that the question and answer should be interpreted in the second alternative sense, and that, if that were so, the express warranty must necessarily be regarded as having overridden the printed conditions, and as having formed part of the contract to the exclusion of the printed conditions.

Later on Scott, L.J., said (8): "The county court judge in " a careful reserved judgment has found that this oral statement " was made, and he refers to it as a warranty, but holds that its " value was destroyed by the qualifying stipulations. He has not " in terms put the question to himself: 'Did the parties by this " 'question and answer intend to exclude the stipulations from " 'the contract that resulted on the fall of the hammer?' "; and the Lord Justice, putting that question to himself, answered it in the affirmative.

The terms of the printed conditions in this case differ from the terms of the printed conditions in *Couchman* v. *Hill* (9), and the language used by the two defendants differs also. Bearing the facts in mind, and in particular the initial silence which greeted the entry of this animal into the ring, and the fact that bidding only began when the defendant's statement had been made, the question may properly be formulated thus: did the defendant imply by this statement that the animal should be sold on the faith of what he stated, to the exclusion of the printed condition 12, or of any other condition which might be found in the auction particulars which would of itself appear to exclude any oral statement? Mr. Laskey argued that neither party may have had in mind, when this particular incident occurred, what were the exact terms of the conditions of sale. I should, however, suppose that, both being experienced in the buying and selling of cattle, they would be aware, according to common practice, that there would be stultifying conditions of some kind in the auction particulars.

If that were the question to be posed, in my judgment it should be answered affirmatively on the facts as found by the judge. I therefore, for my part, would hold that, even if the language used here were a warranty only and not a condition, the plaintiff nevertheless would be entitled to succeed.

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(8) [1947] K. B. 554, 559.

(9) [1947] K. B. 554; [1947] 1 All E. R. 103.

[His Lordship then discussed a question of pleading which arose at the trial, and continued:—] Before leaving *Couchman* v. *Hill* (10) I would like to say one further word about it. To the report in the All England Law Reports there is an editorial note referring to a case of 100 years ago, *Hopkins* v. *Tanqueray* (11), relating to the sale of a horse at Tattersalls. In that case the seller and the buyer happened to have met not at the sale, but the day before it, and the conversation which is related in this note formed no part of the transaction which occurred at the sale itself. At this meeting between the seller and the buyer a statement was made about the soundness of the horse, and later the auction took place. The question in that case was whether what had passed in that previous conversation could affect a stultifying condition in the auction particulars. But the court in *Hopkins* v. *Tanqueray* (11) found that what was said—the promise made by the seller in his private conversation—formed no part of the contract: the contract was formed as a result of the sale at the auction and comprehended the conditions set out in the auction particulars. It is plain, therefore, that that case is wholly distinguishable from *Couchman* v. *Hill* (12), and equally from this case. I say that because the note to which I have alluded suggests that, had *Hopkins* v. *Tanqueray* (13) been referred to at the time of the hearing in this court of *Couchman* v. *Hill* (12), the later decision might have been different. I do not think so. Having considered this editorial note, it seems to me that the earlier case was entirely distinguishable from *Couchman* v. *Hill* (12), and to my mind there is no reason for suggesting that *Couchman* v. *Hill* (12) was otherwise than rightly decided on the issues raised before the court. It binds this court in any case; but I desire to express my entire concurrence with that decision, without, however, committing myself either way on the question whether a private bargain for a warranty, as distinguished from a public bargain, as the bargain was in this case, is assailable on the ground of illegality.

For the reasons which I have stated, therefore, it seems to me that the plaintiff's right to succeed is made good, and there only remains the matter of damages. It has been pointed out by Mr. Laskey that during the period of about eleven weeks, when this animal was in the possession of the plaintiff, it yielded, though on a decreasing scale, a certain quantity of milk. Mr. Laskey

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(10) [1947] K. B. 554; [1947] 1 All E. R. 103.

(11) 15 C. B. 130.

(12) [1947] K. B. 554; [1947] 1 All E. R. 103.

(13) (1854) 15 C. B. 130.

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said that the value of the milk would be about 30*l*. The damages awarded, which are of a sum which makes good to the plaintiff what he paid for the animal, make no allowance in respect of any produce of the animal during its sojourn with the plaintiff. The conclusion of the note of the judgment is this: "Damages "claimed are not excessive. He might have claimed more "because of possibility of infection. No allowance should be made "for profit. I have no evidence as to what it was, or that there "was any. He should be compensated for difference in article "bought from article he actually got". I think that is wholly right. No doubt the plaintiff would obtain some receipts from the sale of the milk. The animal had to be fed. The plaintiff tried it with various kinds of feeding, none of which is particularly cheap, and a veterinary surgeon had to be called in. As the county court judge points out, the fact that a tubercular cow was introduced into the plaintiff's herd might have had very serious results.

In all the circumstances, I can see no good ground for suggesting that the damages awarded were not perfectly fair; indeed, I should have thought that they were on the low side. However that may be, I am satisfied that there is no ground for quarrelling with the award actually made. I think that this appeal fails and should be dismissed.

DENNING, L.J. I agree. I think it probable that the representation by the seller was a condition, but I propose to proceed on the assumption that it was also a warranty. I do this because it is only pleaded as a warranty. I do not think that there was any implied condition of merchantable quality, because this was not a sale by description, but a sale of specific goods. The case must rest upon the express oral warranty, and the question is whether it is excluded by the conditions in the catalogue. In my opinion the law is that, if a seller of goods by auction gives an express oral warranty, he cannot escape from his responsibility for it by saying that the catalogue contained an exempting clause.

This was decided in 1929 in an unreported case, *Lee* v. *Gray*, in which I was counsel, and I have refreshed my memory of it by reference to the records kept by the court. It is so much in point that I will read it. The judgment of the county court judge was in these words: "The plaintiff brings this action to recover "damages for breach of warranty on the sale of a horse. If he "is entitled to recover, the damages are agreed at 26*l*. The sale "was by auction on October 7, 1928, the horse in question being "described in the printed catalogue as a chestnut gelding 'quiet "'and good worker in all gears'. Those words were read out "by the auctioneer before the horse was put up, and they are "plain words of warranty, intended to be acted on, and in fact "relied and acted on by the purchaser, who had no means by "inspection of ascertaining for himself whether the definite "statement as to the horse were true or false. On the evidence "I find that the animal, though in many respects a good and "useful farm horse, would not work in shafts, and was not quiet "in them, it being practically impossible for anyone, except "perhaps a man to whose handling he was specially accustomed, "so to use him. . . .

"I come without hesitation to the conclusion that in material "respects the horse did not answer the description given in the "catalogue and repeated from the rostrum immediately before "the sale. It is, however, contended for the defendant that if "the buyer had read the 'Conditions' printed elsewhere in the "catalogue, he ought to have realized that the representations "made about the horse in that document, and emphasized by "the seller's auctioneer, meant nothing, and that he must not "be so foolish as to attach the least importance to them. The "'Conditions of Sale' were in fact not read by the plaintiff, nor "do I for a moment suppose he would have realized their effect "in the unlikely event of him reading them; but he knew that "the catalogue contained some conditions, and I hold that in "point of law he ignored them at his risk, and that their terms "bind him. That being so, it is said for the defendant that "in the absence of fraud (which is not suggested here), the "conditions relieve him from any responsibility whatever for the "representations made by his authority, and render the description of the horse contained in the catalogue wholly idle. That "view is not one to which I am disposed to accede with undue "willingness.

"Condition 4, relied on for the defence, is in these terms: "'The whole of the lots . . . shall be taken with all faults and "'errors of description . . .'. I find myself unable to distinguish "the case before me from *Taylor* v. *Bullen* (14), and the result "is that the catalogue was a trap for the unwary—a trap well "calculated to catch ninety-nine out of every 100 of the class of "persons who attend farm sales. Authority constrains me to "hold that it has successfully trapped the plaintiff. I may not

(14) (1850) 5 Ex. 779.

"construe the condition as leaving the plain words of warranty "to stand, even as to things where the most cautious of bidders "could not ascertain the truth by examination of the lot. I am "bound to hold that there was no warranty at all. The action "therefore fails and is dismissed; and though in my view there "could hardly be a defence more bare of merits, I cannot punish "the defendant in the matter of costs for choosing to rely on "what I hold to be his rights in point of law . . .".

The buyer appealed to the Divisional Court. The appeal was heard by MacKinnon and Humphreys, JJ., on May 1, 1929, and they allowed the appeal. They held that the express oral warranty given by the auctioneer overrode the stultifying condition in the printed catalogue.

The decision of this court in *Couchman* v. *Hill* (15) is to the same effect. *Hopkins* v. *Tanqueray* (16) is distinguishable because there was no warranty. I have before me Scott, L.J.'s copy of the volume of the All England Reports containing the report of *Couchman* v. *Hill* (17), and I see that he has noted in his own handwriting: "*Hopkins* v. *Tanqueray* (18), a case of a "conversation a day before the sale, is distinguishable. My "attention was drawn to it by the editor of the Law Reports, "February 22, 1947".

The principle which underlies these cases is this: if a person wishes to exempt himself from a liability which the common law imposes on him, he can only do it by an express stipulation brought home to the party affected and assented to by him as part of the contract. The party who is liable at law cannot escape liability by simply putting up a printed notice, or issuing a printed catalogue, containing exempting conditions. He must go further and show affirmatively that it is a contractual document and accepted as such by the party affected: see *Olley* v. *Marlborough Court Ld.* (19). That was not the case with this catalogue.

I agree that the appeal should be dismissed.

ROXBURGH, J. I agree with the Master of the Rolls that the statement made by the defendant became a "condition" of the contract. But, even if this were not so, I am entirely in agreement with what both the Master of the Rolls and Denning, L.J., have said, namely, that, if the oral statement be regarded as a

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(15) [1947] K. B. 554; [1947] 1 All E. R. 103.

(16) 15 C. B. 130.

(17) [1947] 1 All E. R. 103.

(18) 15 C. B. 130.

(19) [1949] 1 K. B. 532.

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warranty, it, having regard to the circumstances in which it was given, overrode condition 12 of the conditions.

Appeal dismissed.

Solicitors: *Balderston, Warren & Co., for Ratcliffe, Son & Henderson, Helston; Mowll & Mowll, Canterbury.*

B. A. B.

REX *v.* SURREY QUARTER SESSIONS.
Ex parte LILLEY.

1951
July 23.

Lord Goddard, C.J., Hilbery and Ormerod, JJ.

Appeal—"Person aggrieved"—County council—Order for costs—Right of appeal against order—Public Health Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 49), *s.* 301.

Distinguished. REG. *v.* NOTTS Q. S., *ex parte* HARLOW [1952] 2 Q.B. 601

Where a court, in the exercise of its discretion, and having power to do so, awards costs against a person, that person is "aggrieved" by the order made against him and may appeal from it.

"A person" in s. 301 of the Public Health Act, 1936, to whom a right of appeal is given if aggrieved by the decision of a court of summary jurisdiction, includes a local authority, since by s. 19 of the Interpretation Act, 1889, "person" in an Act of Parliament includes any body of persons, corporate or incorporate, unless an intention appears to the contrary, and no such intention appears in the Public Health Act, 1936.

Jennings v. *Kelly* [1940] A. C. 206 followed; *Rex* v. *London Quarter Sessions; Ex parte Westminster Corporation*, ante, 508, distinguished.

APPLICATION for an order of certiorari.

The applicant, Sadie Lilley, carried on business at 30 Adelaide Road, Surbiton, Surrey, as principal of a nursery school. She applied to Surrey County Council, as the local health authority, for registration as a child-minder under the Nurseries and Child-Minders Regulation Act, 1948, s. 1, sub-s. 1 (*b*). The county council granted the application subject to the imposition of certain requirements. The applicant objected to the conditions imposed, and, as permitted by s. 4, sub-s. 4, of the Act, she appealed to a court of summary jurisdiction. The justices held that the Act did not apply to the applicant's premises and to the activities carried on there, and that, accordingly, the county council had no power to make the order against which the applicant appealed. They, therefore, allowed the appeal and awarded the applicant 15*l*. 15*s*. costs against the county council.

The council gave notice of appeal to quarter sessions, and at the hearing it was contended on behalf of the applicant that the council had no right of appeal since they were not "persons "aggrieved" by the decision of the court of summary jurisdiction. Quarter sessions held that they had power to hear the appeal, and they accordingly did so and reversed the decision of the court of summary jurisdiction.

It is provided by s. 6, sub-s. 5, of the Nurseries and Child-Minders Regulation Act, 1948, that for the purposes of the Act, ss. 300 to 302 of the Public Health Act, 1936, shall apply. Those sections are concerned with appeals to courts of summary jurisdiction against the decisions of local authorities, and give a further appeal to quarter sessions. Section 301 provides that: "Where "a person aggrieved by any order, determination or other "decision of a court of summary jurisdiction under this Act is "not by any other enactment authorized to appeal to a court of "quarter sessions, he may appeal to such a court".

The applicant now sought an order of certiorari on the ground that the county council were not "persons aggrieved" by the decision of the court of summary jurisdiction within the meaning of s. 301 of the Public Health Act, 1936, and consequently had no right of appeal to quarter sessions.

Alan Garfitt for the applicant. Quarter sessions were wrong in holding that the county council came within the meaning of the words "any person aggrieved" in s. 301 of the Public Health Act, 1936. It is true that they appeared before the court of summary jurisdiction, but they were not "aggrieved" by its decision. They merely appeared to support their own decision on the question of registration. That did not make them parties to the proceedings and they could not, therefore, be "aggrieved" by a reversal of their decision.

What constitutes a "person aggrieved" was laid down in *Ex parte Sidebotham* (1), where it was stated that a "person "aggrieved" did not mean a person who was disappointed or annoyed by an order which was made against him, but one who had suffered a legal grievance. The reversal of the county council's decision may have been an annoyance but it did not aggrieve. Nothing was pronounced against them, nor were they deprived of anything.

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(1) (1879) 14 Ch. D. 599.

The statement in *Ex parte Sidebotham* (1) was expressly approved by the Divisional Court in *Rex* v. *London Sessions, Ex parte Westminster Corporation* (2) when considering the London County Council (General Powers) Act, 1947. The court there held that a borough council, whose cancellation of a street trader's licence was reversed by a magistrate, were not a " person " aggrieved " and therefore had no right to appeal. It is submitted that the arguments which were accepted by the court in that case equally apply in the present instance. In the Act now under consideration the local authority are always referred to as such, and when " persons " are referred to they are referred to as persons. It follows that a person aggrieved cannot include the local authority and that, that being so, quarter sessions were wrong in holding that they were " persons aggrieved " within the meaning of s. 301 of the Public Health Act, 1936. [He also referred to *Rex* v. *Kent Justices* (3) and *Rex* v. *Hannam* (4).]

Ian C. Baillieu for the respondent county council. Quarter sessions were right in holding that the county council had a right of appeal from the decision of the court of summary jurisdiction, since it is submitted that they were " aggrieved " by the order for the payment of costs made against them. It was clearly laid down by the House of Lords in *Jennings* v. *Kelly* (5) that such an order makes the person against whom it is made a person " aggrieved " with a consequent right of appeal. The fact that such an order was made, constitutes a clear distinction between the *Westminster* case (6), where there was no such order, and the present case.

[LORD GODDARD, C.J. What power had the justices in the present case to make an order for the payment of costs?]

Section 300 of the Public Health Act, 1936, provides that the procedure before the court of summary jurisdiction is to be by way of complaint and that the Summary Jurisdiction Acts are to apply to the proceedings. That being so the court was empowered to make an order for costs.

[LORD GODDARD, C.J. That appears to answer the question.]

The next question is whether, being aggrieved, the county council were " persons " within the meaning of s. 301 of the Act of 1936. It is submitted that they clearly were. Section 19 of the Interpretation Act, 1889, provides that the word person in a statute shall include any body of persons corporate or incorporate

(2) Ante, 508.
(3) [1936] 1 K. B. 547.
(4) (1886) 2 T. L. R. 234.
(5) [1940] A. C. 246.
(6) Ante, 508.

unless a contrary intention appears from the Act. No such contrary intention appears in the Public Health Act, 1936, and, if that is so, the county council were persons within the meaning of s. 301, and being " aggrieved " by the order against them for the payment of costs, they had a right of appeal under the section.

Garfitt replied.

LORD GODDARD, C.J. In my opinion this application must fail. The statutory provisions we have to consider are these: under the Nurseries and Child-Minders Regulation Act, 1948, it is provided that: " Every local health authority shall keep " registers "—among other things—" (*b*) of persons in their area " who for reward receive into their homes children under the age " of five to be looked after as aforesaid ", and there is a provision that they may impose conditions when they register an applicant. There is also a provision in s. 8, sub-s. 2, that: " Nothing in this " Act shall apply to the reception of children in any school, not- " withstanding that they are received to be looked after and not " for the purpose of education ".

By s. 6, sub-s. 4, an appeal is given in these terms: " A " person aggrieved by an order under this Act refusing an applica- " tion for registration or cancelling any registration, or imposing " any requirement under s. 2 of this Act, may appeal to a court " of summary jurisdiction ", and certain consequential matters follow on an appeal. It is also provided by sub-s. 5 that for the purposes of this Act, ss. 300 to 302 of the Public Health Act, 1936, shall apply. Those sections deal with appeals to courts of summary jurisdiction against decisions of local authorities and they give a further appeal to quarter sessions. Under s. 300 it is provided: " Where any enactment in this Act provides—(*a*) for " an appeal to a court of summary jurisdiction against a require- " ment, refusal or other decision of a council; or (*b*) for any " matter to be determined by, or an application in respect of any " matter to be made to, a court of summary jurisdiction; the " procedure shall be by way of complaint for an order, and the " Summary Jurisdiction Acts shall apply to the proceedings ". I emphasize that, because that is the section which, by incorporating the Summary Jurisdiction Acts and providing that the proceedings by way of appeal should be by complaint, empowers a court, if they make or refuse an order, to award costs.

It is provided in sub-s. 2 that: " The time within which any " such appeal may be brought shall be twenty-one days from the

" date on which notice of the council's requirement, refusal or " other decision was served upon the person desiring to appeal, " and for the purposes of this sub-section the making of the " complaint shall be deemed to be the bringing of the appeal ". There the word " council " appears, and the time for appeal is limited to twenty-one days from the date on which notice of the council's requirement is served. In that case, therefore, there is a very good reason there for using the word " council " and not the word " person ", or for distinguishing between the council and a person, because it is the council's requirement against which the appeal is to be brought.

Section 301 provides: " Subject as hereinafter provided, where " a person aggrieved by any order, determination or other " decision of a court of summary jurisdiction under this Act is " not by any other enactment authorized to appeal to a court of " quarter sessions, he may appeal to such a court ". The proviso to the section has some importance as indicating the mind of the legislature. It says: " Provided that nothing in this section shall " be construed as conferring a right of appeal from the decision " of a court of summary jurisdiction in any case if each of the " parties concerned might under this Act have required that the " dispute should be determined by arbitration instead of by such " a court ". In some circumstances a party may go to arbitration instead of going to justices, and the proviso enacts that if either of the parties desires arbitration and has not asked for arbitration but has gone to justices, then he cannot appeal to quarter sessions. That seems to indicate that it was in the mind of the legislature that unless this provision had been put in either one of the parties might have appealed.

What happened here was that the county council having made this order refusing to register the applicant except subject to conditions, she appealed to a court of summary jurisdiction. A somewhat strange order was made. The applicant, according to her evidence, applied to be registered and was registered, but apparently she objected to the conditions imposed. Having applied to be registered, she could hardly be heard to say that she was not bound to register under the Act, but the justices found as a matter of fact, that the room where the children were received was not part of the applicant's home; and that the children were received for educational purposes and not for the purpose of being " looked after ". They accordingly held that the Act did not apply to the applicant in respect of those particular premises and to the activities carried on there and that

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the Surrey County Council had no power to make the order in respect of which the applicant appealed. Costs of 15*l*. 15*s*. were awarded to her against the county council. I should doubt very much, although we have not heard argument on the point, whether the justices had power to make that order at all.

The county council appealed against the order, and at first sight this court was of opinion that the case was governed by the recent decision in *Rex* v. *London Quarter Sessions; Ex parte Westminster Corporation* (7), because our attention was not called till a somewhat late stage in the argument, to the fact that the council in the present case had been ordered to pay the costs.

The first point to be decided, is whether the council in this case were " persons aggrieved ". The decision of the House of Lords in *Jennings* v. *Kelly* (8) seems to show that if a court in the exercise of its discretion, and having power to do so, awards costs against a person, that person at once becomes an aggrieved party and can appeal. Unless he does appeal, it is extremely difficult to see how he could get rid of his liability to pay costs. His grievance is that he has been ordered to pay costs and, of course, when he appeals against an order to pay costs, it follows that he must be able to go into the merits, because it is only on a decision on the merits that the appellate court can determine whether he ought to have been ordered to pay costs or not. If the court below had no power to order costs, different considerations might have arisen.

On this point the case is distinguishable from *Rex* v. *London Quarter Sessions; Ex parte Westminster Corporation* (7), because in that case there was no order for costs. There, the corporation having revoked a street trader's licence, the street trader appealed to a metropolitan magistrate. The magistrate reversed the order of the council and granted the applicant a street trader's licence, and this court held that the mere fact that the decision of the council had been reversed did not give them a right to appeal as a party aggrieved. We founded ourselves largely on two well-known cases, *Ex parte Sidebotham* (9) and *Reg.* v. *The Keepers of the Peace and Justices of the County of London* (10), which show that the expression " person aggrieved " in a statute does not mean a person who is disappointed or annoyed at an order having been made against him, but as James, L.J., said in *Ex parte Sidebotham* (9), a person aggrieved must, " be a man who

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(7) Ante, 508.
(8) [1940] A. C. 206.
(9) 14 Ch. D. 599.
(10) (1890) 25 Q. B. D. 357.

" has suffered a legal grievance ", and as Lord Coleridge, C.J., said in the second case to which I referred: " The section does " not give an appeal to anybody but a person who is, by the " direct act of the magistrate ' aggrieved '—that is, who has had " something done or determined against him by the magistrate ".

In the present case something has been done and determined against the county council by the justices, because they have been ordered to pay costs; therefore they were persons who would appear to be persons aggrieved. A further argument was addressed to us, namely, that " person " in s. 301 does not include a local authority. Section 19 of the Interpretation Act, 1889, provides that the word " person " in an Act of Parliament shall include any body of persons corporate or incorporate unless an intention appears to the contrary. We held in the *Westminster* case (11) that an intention did appear to the contrary. In that case we were construing the private Act of the London County Council, and we pointed out that in that Act whenever a reference to the borough council was intended the words " borough council " were used; and that whenever reference was made to a person in respect of whom the corporation were acting, the word " person " was used; and as in the Act under consideration, the appeal was given to a " person aggrieved ", the court thought that the borough council were not included in the word " person ". That was not the only ground of the decision. I, at any rate, intended principally to found my judgment on the point that the person there was not a person " aggrieved ". An order had been made reversing the corporation's decision but the mere fact that the decision was reversed did not make the council a person aggrieved.

It is impossible for us to hold that, once an order for costs has been made, the person who has to pay the costs is not a person aggrieved, for that has been the subject of direct decision in the House of Lords in *Jennings* v. *Kelly* (12). Moreover, in the *Westminster* case (11) we did not have to consider, as we have here, the sections in the Public Health Act, 1936, which are incorporated in the Nurseries and Child-Minders Regulation Act, 1948, but were not incorporated into the London County Council (General Powers) Act, 1947. I think that in this case the same considerations do not apply because all kinds of people are affected under the Public Health Act, 1936. For instance, under that Act it is open to a local authority to sue for expenses

(11) Ante, 508.

(12) [1940] A. C. 206.

before a court of summary jurisdiction. Of course, if they do so, and do not get a judgment, they are "a person aggrieved" by that decision. They are entitled to maintain that a legal wrong has been done to them in the sense that they have not been given the judgment to which they claim to be entitled and therefore, obviously, s. 301 gives them an appeal. Whether the court was right or wrong in the *Westminster* case (13) in refusing to construe the word "person" as including a borough council—though I think they were right in that case in so holding—I am quite certain that the same considerations do not apply here, and for the reasons I have endeavoured to give, I think that the county council in the present case are "persons" and the Interpretation Act, 1889, seems to me to be in no sense excluded. The council, therefore, being persons against whom an order for costs has been made, were persons aggrieved.

I think it would have been much better if the council had either applied for a special case or had moved for certiorari to bring up the somewhat strange order which petty sessions made, and which it seems to me to be one which they really had no power to make, for, as I have said, the applicant having applied to be registered and having appealed against the conditions which were imposed, the justices proceeded to decide that she ought not to be registered at all, which was not the question which was before them, for she could not be heard to say at one moment, "I am entitled to be registered", and then go before the justices and say, "I ought not to be registered".

I think that quarter sessions had power to entertain this appeal, and the application must, therefore, be refused.

HILBERY, J. I am of the same opinion. The applicant here applied to be registered under the Nurseries and Child-Minders Regulation Act, 1948, and made her application to the Surrey County Council. That council attached conditions to an order for her registration as such a person. Objecting to the conditions, the applicant exercised the right of appeal which was given to her to appeal to the court of summary jurisdiction; and the court before whom the matter came by way of complaint, heard the case, and, as Lord Goddard, C.J., has pointed out, they dealt with a question, which was quite extraneous to the matter which the applicant had sought to bring before them. They considered whether she was a person who should be registered under the

(13) Ante, 508.

Nurseries and Child-Minders Regulation Act at all, and, finding that she was not such a person, they allowed the appeal and awarded costs against the county council. The council thereupon entered an appeal to quarter sessions and, on the hearing of that appeal, by her counsel, the applicant objected that they had no jurisdiction to hear the appeal.

It is important to note that ss. 300 to 302 of the Public Health Act, 1936, which relate to appeals, were expressly embodied under s. 6, sub-s. 5, of the Nurseries and Child-Minders Regulation Act into that Act for the purposes of the Act, so one has to look to s. 301 of the Public Health Act to see who were the persons who, in the circumstances of the present case, had a right of appeal, in order to determine the question whether quarter sessions had jurisdiction to hear the appeal of the Surrey County Council.

The applicant based her application for an order of certiorari on the submission to the court that it was bound in the circumstances of the present case by its own decision in *Rex* v. *London Quarter Sessions; Ex parte Westminster Corporation* (13). That case, it is to be remembered, depended entirely on the construction of the sections of the London County Council (General Powers) Act, 1947, and s. 64 of that particular Act was the section which the court was there considering, because it was the section which alone determined the right of appeal to quarter sessions. The section read: "Any person deeming himself "aggrieved by any conviction or order by a court of summary "jurisdiction under any provision of this Act may appeal to the "next practicable court of quarter sessions under and according "to the provisions of the Summary Jurisdiction Acts". The court held that in the circumstances of that case Westminster Corporation was not within the meaning of s. 64 "a person "aggrieved". Westminster Corporation had had no order made against them which cast any burden on them: they were only a person dissatisfied with the decision which had been given against them, or, as it is sometimes expressed, annoyed by that decision; and it is of the utmost importance, in my view, to note that no order for costs had been made against the corporation in that case. The judgment of the court proceeded on the ground that in the circumstances of that case, the corporation were not "aggrieved", and that was really the principal ground on which the court came to its conclusion. Lord Goddard, C.J., also observed that the London County Council (General Powers) Act, 1947, showed that there were reasons for saying that the Act was so framed as to draw a distinction between the authority which might be concerned, and a "person" within the meaning of that Act. Sections 300 to 302 of the Public Health Act, 1936, governing matters of appeal, were not embodied in the Act which the court was in that case considering.

When one turns to those sections, it is observable in the first place that though the different expressions "council" and "person" are indeed used, they are not used comparatively as if to draw a distinction between them when it comes to the question of appeal from the court of summary jurisdiction. Section 300 begins by saying: "Where any enactment in this "Act provides—(*a*) for an appeal to a court of summary jurisdic-"tion against a requirement, refusal or other decision of a council; "or (*b*) for any matter to be determined by, or an application in "respect of any matter to be made to, a court of summary "jurisdiction; the procedure shall be by way of complaint". What is being dealt with there is how an order or requirement or refusal or other decision of a local authority is to be taken before a court of summary jurisdiction. What is under contemplation is only the taking before the court of summary jurisdiction of some act or thing done by the authority. Section 300, sub-s. 2, prescribes the time within which any such appeal may be brought; and there again the datum line of twenty-one days in which the appeal must be brought, is the date on which notice of the authority's requirement, refusal or other decision was served on the person. There, it is necessary to draw the distinction between the authority's requirement and the person on whom it is being served, but for no other reason than that the two words "council" and "person" are used. Section 301 has the words: "Subject as hereinafter provided, where a person aggrieved by "any order, determination or other decision of a court of "summary jurisdiction under this Act is not by any other enact-"ment authorized to appeal to a court of quarter sessions, he "may appeal to such a court". It appears to me that on a fair construction of those two sections there is nothing in the employment of the term "council" and the employment of the term "person" which can be said to drive one to the conclusion that there is some contrary intention in that Act to limit the meaning of the word "person" when used in s. 301 so as to make it any less comprehensive than it would be under the Interpretation Act, 1889. Under that Act "person" includes any body corporate or incorporate unless an intention to the contrary appears. For the reasons I have endeavoured to give it does not appear to me that it is possible to say that the contrary intention appears. It seems to follow that under s. 301 the council is a person, on the construction of these relevant sections of the Public Health Act, 1936, which are not in the same terms as the section which was being construed in the *Westminster* case (14).

Next, on the question whether the " council " was a " person " aggrieved ", all I have to say is that it appears to me that the judgment of Lord Wright in *Jennings* v. *Kelly* (15) is conclusive and binding on this court. If the person under consideration in that case (15) was a person whom it was right to consider as being a person aggrieved, I should have thought it almost a fortiori that in this case the council was a person aggrieved when mulcted in costs by an order of the court of summary jurisdiction. For the reasons I have given I agree that this application must be dismissed.

ORMEROD, J. I agree.

Application dismissed.

Solicitors: *Rising & Ravenscroft, for Sherwood, Cobbing & Williams, Kingston-on-Thames; Wyatt & Co., for T. W. W. Gooderidge, Kingston-on-Thames.*

P. B. D.

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(14) Ante, 508.

(15) [1940] A. C. 206.

1951
June 13, 14.

Lord Goddard, C.J., Lynskey and Devlin, JJ.

PENTECOST AND ANOTHER *v.* LONDON DISTRICT AUDITOR AND ANOTHER.

Local Government—District auditor—Audit—Objection by ratepayers—Duty to surcharge for loss arising from " negligence "—Degree of negligence not relevant—Local Government Act, 1933 (23 & 24 *Geo.* 5, *c.* 51), *ss.* 226, 228, 229.

Section 228, sub-s. 1, of the Local Government Act, 1933, requires a district auditor at every audit of the accounts of a local authority held by him to " surcharge the amount of any loss or deficiency upon " any person by whose negligence or misconduct the loss or deficiency " has been incurred. . . ."

A district auditor refused to surcharge a local authority or their officers concerned in respect of payments in full to contractors which

[Reported by Miss E. DANGERFIELD, Barrister-at-Law.]

the officers had authorized, though the work to which the payments related was defective, the defects having escaped the notice of the officers as the persons responsible for supervising the work; for the auditor found that the instances of defective work did not appear "to have been of an extent or of such frequent occurrence as to warrant my finding that, but for gross negligence on the part of the council's supervising officers, they would have been brought to light."

Held, that the district auditor had misdirected himself in refusing to surcharge on the ground of his inability to find gross negligence, since s. 228, sub-s. 1, required him to surcharge for "negligence" which word in that sub-section meant negligence at common law, that was any breach of duty, whether grave or venial, which caused loss. On the facts found by the auditor, however, neither the council nor their officers had been guilty of negligence, so that although he had applied the wrong test, his conclusion was right in the result.

Per Lord Goddard, C.J. Except in cases of manslaughter the words "gross negligence" should never be used in connexion with any matter to which the common law relates.

Rex v. *Browne* [1907] 2 I. R. 505 and obiter dictum in *Davies* v. *Cowperthwaite* (1938) 159 L. T. 43 disapproved.

APPEAL under s. 229, sub-s. 1, of the Local Government Act, 1933, from a decision of a district auditor.

From July to October, 1949, contractors were engaged in doing repair work, painting and decoration on four housing estates of the Metropolitan Borough of Wandsworth in pursuance of lump sum contracts. Two painters engaged by the borough council to do inside work observed that some of the work of other contractors was not up to the standard required by the terms of the contract. They submitted a list of complaints to their trade union, and representations were made by the union to the council on October 24, 1949, a few days before the last of the four contracts was completed. Certain inquiries were made and, after further pressure, a special sub-committee was appointed by the council to investigate. The sub-committee visited the sites and reported that, in general, the contracts had been completed satisfactorily but that there was some defective work. The contractors made good the defective work which was reported to them. The objectors were not, however, satisfied, and in January, 1951, they appeared at the audit of the accounts and repeated their original complaints to the district auditor for the London audit district.

After hearing the officials of the council who were concerned with passing the work, the district auditor refused to surcharge either the council or the responsible officials. On being asked by the objectors to state, in writing, the reasons for his decision, as required by the Local Government Act, 1933, s. 226, sub-s. 2 (1), he said that " . . . in the main the specific complaints as to " omitted work, slovenly work and 'scamping' were probably " well founded, but I have considerable doubt as to whether or " not . . . the specific defects to which attention has been directed " were characteristic of the general way in which work under the " several contracts was carried out. The objectors, either in the " carrying out of their own duties or in having a personal interest " in particular premises, seem to have been afforded opportunities " of surveying closely the work done by the contractors' workmen. " . . . They were themselves craftsmen in the building trade " and were consequently in a position readily to detect omitted " work and to speak with authority on defective or 'scamped' " work. I think the work of but few contractors would have " completely passed so stringent a test and I doubt, too, whether " the clerks of works upon whom in the first place devolved the " duty of passing and accepting the work on behalf of the council " can reasonably have been expected to have discovered the " particular defects to which the objectors have directed atten- " tion ". He referred to a criticism of the procedure adopted by the clerks of works in passing the work, and said that he was not satisfied that there was anything improper, having regard to the circumstances of the case, in not insisting upon " staging " examinations, as required by the terms of the contract, that is, the completion and thorough examination of one stage before the next was commenced.

He then considered the report of the sub-committee and the defects which they had required to be remedied, and said that there was no evidence that the general conclusion of the sub-committee, subsequently adopted by the council, that the contract had been substantially carried out, was wrong. Finally, he said: "After mature consideration of the evidence I have come to the "conclusion that there have been isolated instances of defective "work which have escaped the notice of the council's technical "supervising officers, but they do not appear to me to have been "of an extent or of such frequent occurrence as to warrant my "finding that, but for gross negligence on the part of the council's "supervising officers, they would have been brought to light".

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(1) Local Government Act, s. 226, sub-s. 1: " A local government elector " for the area to the accounts of which " the audit relates may be present or " may be represented at the audit " and may make any objection to the " accounts before the auditor ".

Sub-s. 2: " The district auditor " shall, on the application of any per- " son who is aggrieved by his decision " on any matter with respect to which " that person has made an objection, " or of any person aggrieved by a dis- " allowance or surcharge made by the " auditor, state in writing the reasons " for his decision ".

Section 228, sub-s. 1: " It shall be " the duty of the district auditor at " every audit held by him . . . (*d*) to " surcharge the amount of any loss or " deficiency upon any person by whose " negligence or misconduct the loss or " deficiency has been incurred ".

Section 229, sub-s. 1: " Any " person who is aggrieved by a de- " cision of a district auditor on any " matter with respect to which he " made an objection at the audit, and " any person aggrieved by a disallow- " ance or surcharge . . . may, where " the . . . decision relates to an " amount exceeding five hundred " pounds, appeal to the High " Court . . .".

The objectors appealed against that decision under s. 229 of the Act of 1933 on the ground that the auditor had conducted the audit without proper regard to the duties which lay upon him, and that he had applied the wrong test in deciding whether to surcharge.

Collard for the objectors. The district auditor misdirected himself in law. Section 228, sub-s. 1, of the Local Government Act, 1933, requires a district auditor to surcharge any loss arising from "negligence". In directing himself that he had to find gross negligence, he applied the wrong test. *Rex* v. *Browne* (2), which would support a contrary view, is not binding on this court, and, though it was cited with approval in *Davies* v. *Cowperthwaite* (3), the approval was obiter.

In addition, it is submitted that the district auditor's finding is wrong in fact, for he said that he could not expect a clerk of works to apply so stringent a test as persons working on the site were able to do, and that is placing too low a duty on clerks of works. It is therefore submitted that, even if the auditor has found not only no gross negligence but also no negligence, his decision is erroneous.

Erskine Simes, *K.C.*, and *A. H. Bray* for the district auditor. In deciding whether to surcharge, the auditor took the view that under s. 228, sub-s. 1, it was not sufficient to show that there had been merely imprudence but that something amounting to culpable negligence must be proved. On the findings of fact, however, it is clear that he took the view that there was no negligence and that was sufficient ground for refusing to surcharge.

M. L. Lyell for the borough council. The district auditor did everything that was prescribed in *Surridge* v. *Hurle-Hobbs* (4). He may have applied the wrong test in seeking to find gross

(2) [1907] 2 I. R. 505.
(3) (1938) 159 L. T. 43.
(4) (1944) 42 L. G. R. 285.

negligence, but that is irrelevant, for, when the reasons he gave for his refusal to surcharge are considered as a whole and the correct test is applied, the result is the same. The reference in *Davies* v. *Cowperthwaite* (5) to *Rex* v. *Browne* (6) is admittedly obiter, but it was approved by all the court and, although not binding, has, it is submitted, some weight.

Collard replied.

LYNSKEY, J. [after stating the facts]. It is said that the district auditor decided that he was unable to surcharge unless he could find gross negligence on the part of either the council or on the part of the officials concerned. True, he finishes his decision by saying: " After mature consideration of the evidence, " I have come to the conclusion that there have been isolated " instances of defective work which have escaped the notice of " the council's technical supervising officers, but they do not " appear to me to have been of an extent or of such frequent " occurrence as to warrant my finding that, but for gross negli- " gence on the part of the council's supervising officers, they " would have been brought to light. The objections, therefore, " fail ". It is said on behalf of the objectors that the district auditor applied the wrong test, for the test as to whether he should surcharge any of the officials was not gross negligence but negligence. [His Lordship read s. 228, sub-s. 1, and continued:] A similar provision, s. 20 of the Local Government (Ireland) Act, 1902, was considered by the King's Bench Division of Ireland in *Rex* v. *Browne* (7). In his judgment Lord O'Brien, C.J., took the view that, as the word " negligence " was used with the word " misconduct ", the negligence must be construed in s. 20 as being negligence involving moral culpability or, to use another phrase, crassa negligentia—gross negligence.

The matter came before a Divisional Court in this country in *Davies* v. *Cowperthwaite* (8). Branson, J., referred to *Rex* v. *Browne* (9), and he quoted, apparently with approval, the observations of Lord O'Brien. He said (10): " It is true that, in the " Irish case *Rex* v. *Browne* (9), Lord O'Brien, C.J., . . . in " dealing with s. 20 of the Local Government Act, 1902, which, " so far as is material, is in the same language as is the section " with which we have to deal, drew attention to the fact that the " word ' negligence ', being associated in the section with the

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(5) 159 L. T. 43.
(6) [1907] 2 I. R. 505.
(7) [1907] 2 I. R. 505.
(8) 159 L. T. 43.
(9) [1907] 2 I. R. 505.
(10) 159 L. T. 43, 44.

" word ' misconduct ' involves, as he thought, some element of " moral culpability. With great respect, I agree. I should not " be prepared to hold that a member of a council, even though " he were advised by the clerk that an act that he was proposing " to do was not lawful, would necessarily be guilty of misconduct " if, nevertheless, honestly believing that the advice which was " given to him was erroneous, he proceeded to do that act ".

It is to be pointed out that Branson, J., in giving the judgment of the court in *Davies* v. *Cowperthwaite* (10), was not dealing with negligence, but with misconduct, and, in so far as he approves or agrees with the observations of Lord O'Brien, C.J., in *Rex* v. *Browne* (11), his remarks were clearly obiter dictum to the decision which he was giving. In those circumstances, although we always treat any judgment of Branson, J., with the greatest respect, particularly in this type of case, his view is not binding on us. With the greatest respect to him, I think that s. 228 means what it says—that the duty of the district auditor is " to surcharge the amount of any loss or deficiency upon any " person by whose negligence or misconduct the loss or deficiency " has been incurred ".

Epithets applied to negligence, so far as the common law is concerned, are really meaningless. Negligence is well known and well defined. A man is either guilty of negligence or he is not guilty of negligence. Gross negligence is not known to the English common law so far as civil proceedings are concerned, and one has only to consider the phrase in criminal cases, particularly in cases of motor manslaughter. In the ordinary case in civil proceedings, either a man is guilty of negligence or he is not. My view is that the use of the word " negligence " in s. 228, sub-s. 1, is negligence as used in its ordinary sense.

In those circumstances, my view is that the district auditor used the wrong expression when he spoke of " gross negligence ". He did so, apparently, because that was his interpretation of *Rex* v. *Browne* (11) and *Davies* v. *Cowperthwaite* (12). If his decision had stood with that finding alone, this court would have had to say that he had applied the wrong test in considering whether there had been loss occasioned by negligence or not. But, reading his finding as a whole, although he uses that expression because, apparently, he thought it was the correct one to use, it is clear that the facts do not disclose even negligence, so that, whether

(10) 159 L. T. 43, 44.
(11) [1907] 2 I. R. 505.
(12) 159 L. T. 43.

he had applied a test of gross negligence or of negligence, it would seem, on his other findings, that the result would have been the same.

The main suggestion by the objectors was that the whole of these moneys under the contract should have been disallowed because there was defective work. [His Lordship read the statement of the district auditor and continued:] That seems to me to be a finding that he is not satisfied, although he certainly finds that some at any rate of the alleged defects existed, that the clerks of works could reasonably have been expected to discover those particular defects, and therefore that, so far as the clerks of works were concerned, they were not guilty of lack of care in not discovering those defects. Their conduct as reasonable men might have been all that it ought to have been and yet they would not have discovered those defects. That finding seems to me to mean that the clerks of works were not guilty of negligence occasioning loss, which is the test. As regards the failure of the clerks of works to insist on " staging ", apparently the auditor was saying that, although it would be desirable to have what is called " staging " and the contracts required it, he was not satisfied by the evidence before him that there was anything improper, in the circumstances of this case, in not insisting on staging examinations, which in my view is a finding that he was not satisfied that there had been any lack of care on the part of the clerks of works.

As regards the council itself, the district auditor has found that the complaints were brought to the notice of the council, that the council appointed a sub-committee to investigate them and on that investigation it was found that there was some substance in some of the complaints, and that the sub-committee required the defective work referred to in those complaints to be put right, but otherwise they were satisfied that the contract had been substantially carried out. The district auditor says that no evidence which he heard was sufficient to induce him to say that the council's decision was wrong.

In those circumstances, the view that I take of the matter is that, although the district auditor says that there is no evidence of gross negligence, his actual finding amounts to a finding of no negligence on the part of either the officials of the council or the council. Therefore, although he took the wrong view of the test to be applied and incorrectly stated it in framing his decision, the result, on his findings, would have been the same if he had applied the correct test.

In those circumstances, I would dismiss the appeal.

LORD GODDARD, C.J. I agree. I desire to add a few words in regard to *Davies* v. *Cowperthwaite* (13) and the use of the expression "gross negligence" in the district auditor's finding. The court, in *Davies* v. *Cowperthwaite* (13), relied on and approved the decision of the Irish court of King's Bench in *Rex* v. *Browne* (14). Both of those cases concerned misconduct and not negligence. The allegation in both cases was that the local authority, having received certain advice, disregarded it and made payments, and that was said to be misconduct. If the court in Ireland meant to apply the same test to negligence as to misconduct, with all respect to them I disagree. The judgment in *Davies* v. *Cowperthwaite* (13) was, in fact, obiter in so far as it was dealing with negligence. The use of the expression "gross "negligence" is always misleading. Except in the one case of the law relating to manslaughter, the words "gross negligence" should never be used in connexion with any matter to which the common law relates, and for this reason: negligence is a breach of duty. If there is a duty and there has been a breach of it which causes loss, it matters not whether it is a venial breach or a serious one: a breach of a legal duty in any degree which causes loss is actionable. The question whether it is venial or gross is quite immaterial. The expression "crassa negligentia" which is found in the books has generally been used by equity judges in considering cases relating to the degree of duty owed by directors. When such cases as *Overend and Gurney Co.* v. *Gibb* (15) and *In re Faure Electric Accumulator Co.* (16) are understood, it will be found that the court was concerned with the degree of duty which the directors owed, and that where they have been held not liable, although it has been contended that they have been guilty of crassa negligentia, it is because the court has found that the duty was not broken, all that has been found against the director being that he has been guilty of an error of judgment or a want of judgment, which is not enough to render him liable. Where it is a matter of the duty which is imposed, either by statute or by common law, any breach of the duty is enough, provided that it causes loss, to impose liability.

(13) 159 L. T. 43.
(14) [1907] 2 I. R. 505.
(15) [1872] L. R. 5 H. L. 480.
(16) (1888) 40 Ch. D. 141.

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Lord Goddard, C.J.

For myself, I can see no ground for reading into the clear words of this statute, "by whose negligence or misconduct the "loss or deficiency has been incurred", the word "gross", or for holding that s. 228, sub-s. 1, should be construed as referring to gross negligence and not to any degree of negligence.

For the reasons given by my brother Lynskey, I entirely agree that this appeal fails, because it follows that, if there has been no negligence, there has been no gross negligence. In my view, the only true interpretation of the district auditor's findings in this case is that there was, in the circumstances, no negligence.

The appeal fails.

DEVLIN, J. I agree that the appeal fails, and I add a few words only because we are differing from the obiter dicta contained in the Irish case *Rex* v. *Browne* (17) and in *Davies* v. *Cowperthwaite* (18) of Branson, J., Humphreys, J., agreeing; obiter dicta which, of course, have high persuasive authority.

One must approach the construction of this sub-section by assuming that prima facie the word "negligence" in every statute has its ordinary common-law meaning. I am not satisfied that the mere fact that the draftsman has used it as an alternative to "misconduct" affects its meaning in any way, either by adding to it the epithet "gross", which my Lord has pointed out is one which should be discouraged in the common law, or by adding to it any element of moral culpability. Indeed, I think that the wording of the statute itself suggests the contrary. Clearly, "negligence" is intended to be an alternative to "misconduct", and if one adds to negligence the element of moral culpability, it is difficult to see any distinction between negligence with moral culpability and misconduct. I therefore think that the right construction of the word "negli-"gence" is its ordinary meaning, which my Lord has assigned to it. It does not follow that every mistake or every want of judgment or every error of judgment on the part of any local authority or official will lead to a surcharge. The test will be that of negligence in its ordinary sense, which is commonly applied in these courts.

Appeal dismissed.

Solicitors: *Seifert, Sedley & Co.; Sharpe, Pritchard & Co.*

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(17) [1907] 2 I. R. 505.

(18) 159 L. T. 43.

C. A.

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July 6; 30.

Jenkins and Birkett, L.JJ.

ROGERS *v.* LEWISHAM BOROUGH COUNCIL.

Rating—Building certified as used for public religious worship—Four rooms used weekly for secular activities for children followed by religious services—Rooms not "exclusively appropriated to public religious worship"—Exemption from rates as premises used for Sunday school—Poor Rate Exemption Act, 1833 (3 *&* 4 *Will.* 4, *c.* 30), *ss.* 1, 2—*Sunday and Ragged School* (*Exemption from Rating*) *Act*, 1869 (32 *&* 33 *Vict. c.* 40), *s.* 2.

A building belonging to a charitable trust and registered as exclusively appropriated to public religious worship included, in addition to a hall, four classrooms which rooms were used on four evenings for meetings for children at which they played games and did handicrafts, each meeting concluding with a religious service or religious instruction. The classrooms were never let and no charge was made to those who attended the meetings. The rating authority entered the classrooms in the valuation list as rateable, and the trustees of the building contended that the classrooms were entitled to exemption from rating under the Poor Rate Exemption Act, 1833.

Held, (1.) that the four classrooms were not exclusively "appropriated to public religious worship" and accordingly were not entitled to exemption from rates under s. 1 of the Poor Rate Exemption Act, 1833.

Cardiff Archdiocese Trustees v. *Pontypridd Assessment Committee*, (1930) 46 T. L. R. 633, considered.

Stradling v. *Higgins*, [1932] 1 Ch. 143, distinguished.

Smith v. *Edinburgh Parish Council*, (1901) 3 F. 414, applied.

(2.) That the fact that no rent or profit was derived from the classrooms did not result in any exemption from liability to rating under the proviso to s. 1 of the Act of 1833; but

(3.) That, on a reading of s. 2 of the Act of 1833 in conjunction with the definition of "Sunday school" in the Sunday and Ragged Schools (Exemption from Rating) Act, 1869, the weekday activities, secular as well as devotional, at the children's meetings constituted a Sunday school, because all the activities conducted were in furtherance of the object of giving religious instruction. Accordingly, the classrooms, although not exclusively appropriated to public religious worship within s. 1 of the Act of 1833, were nevertheless entitled to exemption from rating under s. 2 of that Act as premises used for a Sunday school.

Case stated by the Lands Tribunal for the decision of the Court of Appeal under s. 3, sub-s. 4, of the Lands Tribunal Act, 1949.

The appeal was by J. W. P. Rogers, on behalf of himself and of the other trustees of the Lee Gospel Hall, Lewisham, against the decision of the Lands Tribunal affirming a direction of the respondents, Lewisham Borough Council, as the rating authority, that four classrooms forming part of the hall should be entered in the valuation list at the gross value of 10*l.* net rateable value of 6*l.*

The Lee Gospel Hall was completed in 1950 and consisted of the hall itself and the four classrooms in question. It was occupied by the Gospel Hall Assembly subject to the terms of a trust deed of February 9, 1950. It was conceded that the hall itself was exempt from rating because it was exclusively appropriated to public religious worship and was so registered.

The Lands Tribunal found the following facts to be proved or admitted:—In addition to their use on Sunday mornings and afternoons for children's services, the four classrooms were at the date of the proposal occupied for the following purposes on four evenings in every week. On Monday evenings boys aged twelve to fourteen years played draughts, monopoly, table tennis and other games for one hour and a half. They then devoted half an hour to the study of scriptures and to prayers. On Tuesday evenings boys of under nine years constructed such things as model aeroplanes, and girls of the same age group knitted small articles for one hour, which was followed by a devotional talk for half an hour. On Wednesday evenings girls over nine years spent one hour and a half on handicrafts, knitting, embroidery and making soft toys, and then spent half an hour in hymn-singing and a talk from the scriptures. On Thursday evenings boys aged nine to twelve years played various games (not including table tennis) for an hour and then had a suitable service for half an hour. No other secular activity was conducted within the building.

No part of the building was ever let, and no entrance fees were ever charged. All meetings and activities were open to all children of the appropriate age, whether or not concerned in other work of the Lee Gospel Assembly.

The question raised by the appeal was whether the four classrooms were entitled to exemption from rating under the Poor Rate Exemption Act, 1833 (1).

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(1) Poor Rate Exemption Act, 1833, s. 1: "No person or persons "shall be rated or shall be liable to be "rated . . . for or in respect of any "churches, district churches, chapels, "meeting houses, or premises, or "such part thereof as shall be ex-"clusively appropriated to public "religious worship. . . . Provided "always, that no person or persons "shall be hereby exempted from any "such rates or cesses for or in respect "of any parts of such churches, dis-"trict churches, chapels, meeting "houses or other premises which are "not so exclusively appropriated, and "from which parts not so exclusively "appropriated such person or persons

Michael Rowe, K.C., and *Francis Coningsby* for the trustee. It is submitted, first, that these four classrooms are exclusively appropriated for public religious worship within s. 1 of the Poor Rate Exemption Act, 1833. The meetings for children are solely conducted with a view to giving instruction in the religious way of life. The games and handicrafts are carried on with a view to furthering a state of mind which can profit from religious instruction and services. It is further submitted that the proviso to s. 1 establishes that, if no profit or advantage is derived from the building, the exemption from rateability is not lost by the use of the premises for purposes merely ancillary to public religious worship. The authorities are not of great assistance, but they do establish that the exemption from rateability is not lost by an ancillary use. [They referred to *Cardiff Archdiocese Trustees* v. *Pontypridd Assessment Committee* (2) and *Walton-le-Dale Urban District Council* v. *Greenwood* (3).] The decision in *Stradling* v. *Higgins* (4) is not of great assistance, because it turns on the different wording of another Act.

Secondly, it is submitted that if the classrooms are not exclusively appropriated for public religious worship they are exempt from rates under s. 2 of the Act of 1833, since these meetings for children constitute a Sunday school. [They referred to *Smith* v. *Edinburgh Parish Council* (5).]

Scott Henderson, K.C., and *M. L. Lyell* for the borough council. The decision of the Lands Tribunal was right. It is impossible to say, having regard to the secular activities carried on in these classrooms, that they are exclusively appropriated to public religious worship. Nor can the games and handicrafts be said to be merely ancillary to public religious worship. It is conceded that use of part of the premises for cloakrooms, storerooms and other uses necessary for the use of the premises for religious worship would not cause premises to lose their exemption

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"shall receive any rent or rents, or "shall derive profit or advantage".

Section 2: "No person or persons "shall be liable to any such rates or "cesses because the said churches, "district churches or chapels, meeting "houses, or other premises, or any "vestry rooms belonging thereto, or "any part thereof, may be used for "Sunday or infant schools or for the "charitable education of the poor".

By the Sunday and Ragged Schools (Exemption from Rating) Act, 1869, a Sunday school was defined as: "Any school used for giving religious "education gratuitously to children "and young persons on Sunday, and "on week days for the holding of "classes and meetings in furtherance "of the same object, and without "pecuniary profit being derived there-"from".

(2) (1930) 46 T. L. R. 633.

(3) (1911) 75 J. P. 541.

(4) [1932] 1 Ch. 143.

(5) (1901) 3 Fraser 414.

from rates. [They referred to *Battersea Borough Council* v. *British Iron and Steel Research Association* (6).] The tribunal found as a fact that the classrooms were used for secular purposes, and that finding binds the Court of Appeal. On its true construction s. 1 of the Act of 1833 means that no part of premises not exclusively used for public religious worship shall be exempt from rating. The Act of 1869 did not extend the scope of the Act of 1833, and it is not permissible to look at the definition of Sunday school in the Act of 1869 to extend the meaning of that expression in the Act of 1833. The playing of games cannot constitute a Sunday school.

Rowe, K.C., in reply. The only object of the weekday meetings is the furtherance of religious instruction. It is submitted that the definition of " Sunday school " in the Act of 1869 throws light on the meaning of that term in the Act of 1833.

Cur. adv. vult.

July 30. BIRKETT, L.J., read the following judgment of the court:—This appeal raises important questions on the construction of the Poor Rate Exemption Act, 1833. It would be convenient if we first set out the procedure that has been followed, and the relevant facts of the case, before considering the provisions of the Act of 1833, and the authorities that were cited to us. [His Lordship stated the facts and read the relevant sections of the Act of 1833 and continued:—] On the facts found in the special case, and on the true construction of the Act of 1833, it was submitted on behalf of the trustees of the hall: (1.) that the provisions of the Act of 1833 applied to the four classrooms in that they were exclusively appropriated to public religious worship. (2.) That if it were held that the four classrooms were not exclusively appropriated to public religious worship, then under the proviso to s. 1 of the Act of 1833 it must be shown that rents were recovered or some profit or advantage was derived before the exemption from rating could be lost; and it was not suggested that any rents were recovered, or any profit or advantage was derived on the facts as found in this case. (3.) That the four classrooms were exempt from rating because they were used as a Sunday school and the provisions of s. 2 of the Act of 1833 applied.

It was submitted on behalf of the rating authority: (1.) that

(6) [1949] 1 K. B. 434.

the Act of 1833 had no application to the four classrooms inasmuch as they were not exclusively appropriated to public religious worship; (2.) that the proviso to s. 1 of the Act of 1833 had no application for the same reason, and if the four classrooms were not exclusively appropriated to public religious worship, the words relating to rents, profit or advantage must be regarded as being immaterial; and (3.) that s. 2 of the Act of 1833 did not apply, for, on the facts found, the use of the four classrooms did not constitute a Sunday school within the meaning of the section.

Section 1 of the Act of 1833 with the proviso is admittedly very difficult to construe. In Ryde on Rating (9th ed.), p. 160, it is suggested that the difficulties arise in part from the supposition that the original draft of the section became dislocated in some way so that the whole section became ungrammatical and obscure. Whether this is so or not, the true meaning of the section would appear to be "churches, district churches, chapels, meeting "houses or premises which shall be exclusively appropriated to "public religious worship, or such parts thereof as shall be so "appropriated".

In *Cardiff Archdiocese Trustees* v. *Pontypridd Assessment Committee* (7) it was held that the whole of a building might be duly certified for the performance of public religious worship, yet nevertheless a part of the building might not be exclusively appropriated for public religious worship. The first question to be determined on this appeal is whether the use made of these four classrooms on weekday evenings as set out in the case stated is such that it can still be said that they are exclusively appropriated to public religious worship. We appreciate the argument of Mr. Rowe, for the trustee, that all the activities of the Brethren, whether carried out on Sundays or on weekdays, have one supreme religious purpose. We have no doubt that this is so, but that does not conclude the matter. The singing of hymns, the reading of the scriptures, the prayers and the devotional addresses, however laudable and desirable they may be in themselves, cannot be considered in isolation when deciding the issue in this case. The other activities which have been called for convenience "secular activities"—table tennis, draughts, monopoly, the building of model aeroplanes, the knitting and embroidery and toy making—must also be considered.

Mr. Rowe urged upon us that these other activities, when

(7) 46 T. L. R. 633.

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considered in the light of the religious setting in which they were carried on, were to be regarded as mere elements in the larger purpose, and did not therefore detract from the use of the classrooms as being exclusively appropriated for public religious worship. We fully appreciate the argument. We can well understand how desirable it is to use modern methods to attract and interest the young and so bring them into a religious atmosphere where they will be surrounded by good influences; but the use of attractive games or attractive employments as a means to the great end, cannot, we think, justify us in holding that these activities are such that it is still possible to say that the classrooms are exclusively appropriated to public religious worship.

Mr. Rowe argued, and Mr. Scott Henderson agreed, that, although s. 1 of the Act in terms only exempts premises or parts of premises exclusively appropriated to public religious worship, it cannot reasonably be construed so strictly as to make the use for purposes incidental to such appropriation a disqualifying factor. Examples were given, such as the boiler rooms, vestries, cloakrooms, and storerooms for cleaning materials and so forth, commonly included in the premises of a church or chapel; and it was agreed on both sides that the exemption would not be lost merely on account of the use of such ancillary conveniences for purposes in themselves secular. This indeed is no more than is demanded by common sense in order to give practical effect to the section. But Mr. Rowe's argument went much further, as we understood it. He claimed that in the present case, the uses to which the four classrooms are put on weekdays, if not in themselves "public religious worship", are at all events incidental to the use of the premises as a whole for public religious worship, and accordingly should not be regarded as taking them out of the category of premises exclusively appropriated to that purpose.

We cannot agree with this argument. The incidental purposes which we have used by way of illustration are, broadly speaking, purposes of a kind which must be served in connexion with any building to whatever use it is put, and may properly be described as essentially ancillary purposes. The secular uses to which the classrooms in the present case are put on weekdays are of an entirely different order. They are activities such as one would expect to find carried on in any young people's club, capable of being regarded as ends in themselves, and not in their nature

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essentially ancillary to the use of the premises for public religious worship.

In what sense then can they be said to be incidental to that use? It seems to us only in the indirect sense that such social activities (apart from such ethical value as they may under proper supervision possess in themselves) tend to encourage attendance at public religious worship held on the premises. In our view this is too remote. The position might be different if the condition of exemption were the use of premises for the promotion of religion. It might then conceivably be said that social activities such as these were incidental or conducive to the one object of promoting religion. But the exemption, being confined as it is to premises exclusively appropriated to public religious worship, seems to us to postulate use for a particular purpose (that is public religious worship), as distinct from the attainment of a particular object such as the promotion of religion. The range of uses which can properly be regarded as incidental is thus much narrower, and, generally speaking, we do not think that any use (not in itself public religious worship) can properly be so regarded, unless it is either reasonably necessary to enable the premises to be used for public religious worship, or of an activity of a kind customarily regarded as appropriate to be carried on in a place of public religious worship, though not in itself a religious service. The question whether a particular activity passes the second of these tests is necessarily one of fact and degree, but we hardly think that (for instance) an occasional oratorio, organ recital, carol concert, or mystery play could be regarded as disqualifying a church or chapel from the exemption. We are, however, satisfied that the secular purposes to which the classrooms are put in the present case do not satisfy either test.

We were referred to a number of authorities from which little assistance can be derived, each having been decided on its own particular facts. We think their effect can fairly be summarized by saying that, with the exception of *Stradling* v. *Higgins* (8), to which we make further reference below, none of them afford any support at all for the extremely broad interpretation Mr. Rowe invites us to place on the expression "exclusively appropriated "to public religious worship"; though it is right to add that (with the same exception) there were in all of them circumstances adverse to his contention (such as the sale of tickets for admission to particular functions) which have no counterpart in the present case.

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(8) [1932] 1 Ch. 143.

We have already mentioned *Cardiff Archdiocese Trustees* v. *Pontypridd Assessment Committee* (9), and only propose to refer to two others. The first is *Stradling* v. *Higgins* (10), on which some reliance was placed by Mr. Rowe. It arose under the Places of Worship (Enfranchisement) Act, 1920, which applies to " . . . premises . . . held upon trust to be used for the pur-" poses of a place of worship, . . . and used in accordance with " the terms of the trust ". The expression " place of worship " being defined as " any church, chapel or other building used for " public religious worship, and includes a burial ground, Sunday " or Sabbath school, caretaker's house or minister's house " attached to or used in connexion with and held upon the same " trusts as a place of worship ".

Maugham, J., held that certain premises of the Salvation Army comprising a " Salvation Army Hall " used for religious worship, and a " Young People's Hall " used as to some rooms in its upper part for teaching, came within this definition. He said (10): " But with regard to the adjoining building, Carlton " House, or the Young People's Hall, there are a number of " rooms upstairs which are not prima facie rooms used for the " purpose of hymns or religious services or addresses, but are " used for the purpose of instruction. A good deal of reliance " has been placed upon that, but it is to be remembered that in " the Act the expression ' place of worship ' includes a ' Sunday " ' or Sabbath school . . . used in connexion with and held upon " ' the same trusts as a place of worship '. I should therefore " imagine that these rooms, so far as they are used for the " purposes of anything in the nature of a Sunday school, are " clearly within the definition. I wish to add this, that I do not " consider in a case of this sort that the premises are the less " held upon trust for the purposes of a place of worship because " there are included in the premises certain rooms which may be " used for secular objects. I do not suppose that any living " human being would doubt that St. Paul's Cathedral was a " place used for the purposes of a place of public worship, but " those who know it, know that it includes, amongst a number " of other rooms to which the public are not generally admitted, " an excellent and interesting library in which prayers do not " take place, and I doubt whether there is any big cathedral in " England of which the same might not be said. There might " also be rooms for caretakers. In the old days, in connexion

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(9) 46 T. L. R. 633.

(10) [1932] 1 Ch. 143, 151.

"with many churches, there was a priest's room, and I could "suggest other rooms to which visitors to buildings of this kind "are often admitted which are not used for the purposes of "public worship. It occurs to me to mention as examples "chapter-houses, places where vestments are kept, and places "where books are kept. In other words, to put it another way, "I have come to the conclusion that premises are held upon "trust to be used for the purposes of public religious worship "none the less because some of the minor or less important "parts of those premises are not used for public worship".

We cannot regard that decision as affording any real support for Mr. Rowe's argument in the present case. "Used for the "purposes of a place of public religious worship" is clearly a description which admits of more latitude of interpretation than "exclusively appropriated to public religious worship" which is the description to be construed in this case.

The other case to which we would refer is *Smith* v. *Edinburgh Parish Council* (11), a case under the Rating Exemptions (Scotland) Act, 1874, where exemption was claimed for certain church halls under a provision similar to s. 1 of the Act of 1833. With respect to the secular uses to which one of these halls was put, the Lord President said (12): "It is true that the purposes "mentioned are excellent, and I have no doubt that such halls "are built in pursuance of the larger views as to the duties of the "Christian Church which now prevail, and of the advantages "resulting from bringing the members of a congregation together "otherwise than merely once or twice a week for religious wor-"ship. Doubtless the halls are aids to religious life and work of "the church, but they are certainly not exclusively appropriated "to public religious worship, and, if that be so, they do not come "within the leading enactment". This passage, mutatis mutandis, seems to us to be applicable to the present case.

We now turn to consider the second argument of Mr. Rowe relating to the proviso to s. 1 of the Act. The proviso presents great difficulty in its construction, and it is not easy to give any meaning, or any sensible meaning to it, when the purpose of the section itself is kept in mind. Mr. Rowe contended that if these classrooms were not exclusively appropriated to public religious worship, nevertheless exemption from rating was not lost unless rent or rents were received, or profit or advantage was derived. That he said was the meaning of the proviso, because of the use of the word " and " in the proviso; and as it was admitted that no rents were received and no profit or advantage was derived, the four classrooms should be exempt. Mr. Scott Henderson sought to explain the difficulties of construing the proviso on historical grounds, and cited two cases in support of his explanation. He submitted that the meaning of the proviso was obscure because of the contradiction between the proviso and the first part of the section; but we ought to construe it in the light of the first part, and hold that no part of a building could be exempted unless it was first shown that it was exclusively appropriated to public religious worship; and if it were shown that it was not so exclusively appropriated, then the question of rents, profit or advantage was immaterial. We are acutely conscious of the difficulties of construing the proviso, when the first part of the section is kept in mind, and it is perhaps enough for us to say that, having regard to our conclusion on the first part of the section, we do not think that the proviso affords to the trustee the exemption from rating which he claims.

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(11) 3 Fraser 414.

(12) Ibid. 418.

Finally, s. 2 of the Act of 1833 must be considered. " Provided always, that no person or persons shall be liable to any " such rates or cesses because the said churches, district " churches, chapels, meeting houses, or other premises, or any " vestry rooms belonging thereto, or any part thereof, may be " used for Sunday or infant schools, or for the charitable education of the poor ". It is to be observed that the words " or " any vestry rooms belonging thereto " have been added to " churches, district churches, chapels, meeting houses, or " other premises ".

The purpose of the section, it seems, was to give exemption from rates to rooms used for a Sunday school; or rather that no building should lose its character of being exclusively appropriated to public religious worship by reason of the fact that the building or any part of it was used as a Sunday school. No definition is given of a Sunday school in the Act of 1833, but it is not unimportant to remember that in 1833 Sunday schools gave more than religious instruction. In s. 2 of the Sunday and Ragged Schools (Exemption from Rating) Act of 1869 a definition of Sunday school is given. It reads: " A Sunday school shall " mean any school used for giving religious education " gratuitously to children and young persons on Sunday, and on " weekdays for the holding of classes and meetings in furtherance " of the same object, and without pecuniary profit being derived " therefrom ". The Act of 1869 gave a discretion to the rating

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authority to exempt buildings which came within the definition contained in the Act, but it expressly provided that nothing in the Act should affect the right of exemption given by s. 2 of the Act of 1833.

Without the assistance of the definition of Sunday school given by the Act of 1869, it is right to remember that the Sunday school of 1833 was more than a school meeting on Sundays. Children had to be taught to read, so that they could more readily profit from the religious instruction given on Sundays by learning to read the Catechism and the Scriptures or the hymn books for themselves. The Act of 1869 would seem to have defined in s. 2 the characteristics of a Sunday school as they were known to exist. This included the holding of classes and meetings during the week in furtherance of the objects of the Sunday school. But in the present case rooms are used on Monday evenings by boys from twelve to fourteen for the playing of games for an hour and a half, followed by the study of the Scriptures and prayers for half an hour. On Tuesdays, Wednesdays and Thursdays the rooms are used for similar purposes, but on each night there is half an hour devoted to religious exercises of one kind or another. Children of the appropriate age group are welcomed to all the meetings, whether they take part in any of the other activities of the Lee Gospel Hall or not, and no other activities of a secular nature are at any time carried on at the premises. The question is whether this use of the classrooms can be held to be a use of the rooms for the purpose of a Sunday school.

We are, we think, entitled to look for guidance on this question to the definition already quoted from the Act of 1869. These classrooms are found in the case to be used on Sunday mornings and afternoons for children's services. We take this as equivalent to finding that they are used for giving religious education to children and young persons on Sundays. There is no doubt that they are so used gratuitously. The first limb of the section is thus satisfied. The weekday use, so far as it consists of Scripture study, prayers, or other devotional exercises, seems to us clearly to be use for classes or meetings in furtherance of the same object.

So far as secular activities are pursued at these weekday meetings, it seems to us to be plain on the facts found that these activities, though not devotional in themselves, are organized with the single purpose of furthering the religious education of the young people who attend, by putting them in a frame of mind receptive of religious instruction (or, as one of the appellant's witnesses put it, breaking down their resistance to religion) and also by encouraging the attendance of children of the appropriate ages. No doubt the secular activities would give pleasure to the children in developing skill in the use of their hands and eyes, and under the supervision of the teachers would inculcate standards of behaviour and make them the more ready to attend the meetings because they were interesting and attractive. But it is important here to remember that every weekday meeting does in fact conclude with some form of religious exercise or instruction. This religious setting, in which all the activities are carried on, was to further the supreme object of the Sunday school which was to give religious education. Accordingly, it seems to us that the whole of the weekday activities, secular as well as devotional, can fairly and properly be brought within the category of meetings "in furtherance of the same object" within the meaning of the definition. Again, there is of course no doubt that no pecuniary profit is derived from these weekday meetings. If the Gospel Hall and the classrooms were the subject of one entry only in the valuation list, the building would not lose its exemption from rating because the classrooms were used as a Sunday school. For these reasons we think that although the classrooms cannot be said to be exclusively appropriated to public religious worship within the meaning of s. 1 of the Act of 1833, they are nevertheless entitled to exemption under s. 2, as premises used for a Sunday school, or Sunday schools within the meaning of that section. The appeal must therefore be allowed.

Appeal allowed.

Solicitors: *Stunt & Son; Solicitor of Inland Revenue.*

B. A. B.

WATSON *v.* MINISTER OF LOCAL GOVERNMENT AND PLANNING.

1951
July 24.

Devlin, J.

Housing—Compulsory acquisition of land for housing—Duty of housing authority to consider "the needs of the district"—Construction—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 71.

"The needs" of a district within the meaning of s. 71 of the Housing Act, 1936, are not confined to the needs of persons living in it at the time when an order for the compulsory acquisition of land in the district for housing purposes is made, for it is not outside the purview of a housing authority, in considering the provision of housing accommodation, to have regard to the fact that, in part, they will be making provision for persons who are then living in an adjoining district but who desire, or will more easily obtain, housing accommodation in the district of the acquiring authority.

APPEAL under the Housing Act, 1936.

On August 26, 1950, the appellant, Arthur Charles Watson, the owner of Waite Lane End Farm, Waterlooville, in the County of Southampton, was served with a notice by Havant and Waterloo Urban District Council of their intention to make a compulsory purchase order under s. 74 of the Housing Act, 1936, in respect of land owned by him. Notice of objection to the making of the order was given by the appellant, and the Minister of Local Government and Planning promoted a public local inquiry at which the appellant and other objectors to the proposed order were present. It was decided to confirm the order, with modifications. It was stated in an affidavit by the official who held the inquiry that " the conclusion was reached that the land com-" prised in the order was required immediately by the Havant " and Waterloo Urban District Council for the purposes of Part V " of the Housing Act, 1936, in order to house persons in immediate " need of housing accommodation. Some of these persons are " now living in the urban district of Havant and Waterloo, while " others are now living in the county borough. It was considered " that the available accommodation in the county borough of " Portsmouth is insufficient for the needs of persons now living " in the county borough and immediate development for rehous-" ing such persons outside the county borough is urgent and " necessary ".

On March 8, 1951, the appellant was served with a notice stating that the compulsory purchase order had been confirmed by the Minister. He appealed against the order on the grounds that the order authorized the acquisition of land for purposes other than, and in addition to, those purposes for which the urban district council were empowered to acquire land under Part V of the Housing Act, 1936; and in particular that a substantial number of the houses which it was intended to erect on the land acquired were not required for the housing needs of the district for which the council was the housing authority, but were to be made available to persons who might be displaced from the district of the county borough of Portsmouth.

D. P. Kerrigan for the appellant. The urban district council had no power in this case to make a compulsory purchase order. Under s. 71 of the Housing Act, 1936 (1), the duty of the local authority is clearly defined, and it is limited to considering the needs of their own district.

[DEVLIN, J. Is it your contention that the housing accommodation contemplated must be restricted to the needs of people in the area at the time when the order is made?]

It is so contended. The fact that there is a great housing need in an adjoining area is not a matter which the local authority are entitled to take into account. That is the " need " of the adjoining area. The order in the present case was made in part for providing for the needs of Portsmouth, and the question is whether those needs can also be regarded as being the needs of the Havant and Waterloo Urban District Council. It is submitted that they cannot, and that the urban district council are only entitled to consider the needs of their own district.

Sir Lynn Ungoed-Thomas, S.-G., and J. P. Ashworth for the Minister. The question is entirely one of the construction of s. 71 of the Housing Act, 1936. No question of merits is involved since if the land in the present case could not be acquired by the Havant and Waterloo Urban District Council it could have been acquired by the Portsmouth Borough Council. It is therefore merely a question whether the compulsory order was made by the proper local authority. The short point for decision is whether " the needs of the district " in s. 71 means the needs of the persons living in the district at the date when the compulsory order is made. There are nowhere to be found in the Act any words which restrict the consideration of the needs of the district to the needs of those persons living in the district at any particular time. No arrangement was made with Portsmouth for the provision of accommodation for persons leaving that district for Havant, and the council of the latter district were concerned with their own urgent needs in desiring to provide accommodation for such persons.

The " needs " in the present case are the needs of Havant resulting from the overspill of population from Portsmouth, and there is nothing in the Housing Act, 1936, to prevent the local authority concerned from making provision for such needs.

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(1) Housing Act, 1936, s. 71: " It " shall be the duty of every local " authority to consider the housing " conditions in their district and the " needs of the district with respect " to the provision of further housing " accommodation . . . and for that " purpose to prepare and submit to " the Minister's proposals for the pro- " vision of new houses . . .".

Kerrigan replied.

Devlin, J. [after referring to the facts]. The ground on which the validity of the order is challenged is that the urban district council have no power under Part V of the Housing Act, 1936, to acquire land except for the needs of their own district, whereas the statement made in the present case shows that they are seeking, in part at any rate, to provide housing accommodation for people who are now living in the county borough of Portsmouth.

Section 74, sub-s. 1, of the Housing Act, 1936, provides: "Land for the purposes of this Part of this Act may be acquired "by a local authority by agreement, or they may be authorized "to purchase land compulsorily for those purposes . . .". Section 72 provides that: "A local authority may provide housing "accommodation for the working classes" (that term has been altered now by the Housing Act, 1949), "(*a*) by the erection of "houses on any land acquired or appropriated by them". The words of the statute so far, therefore, are quite wide, and the local authority might, if the matter stopped there, acquire land for the provision of housing accommodation for anybody, no matter in what district they lived. But s. 71, which begins Part V of the Act, although it does not give any power to build, puts on local authorities the duty of reviewing housing conditions in their areas and of framing proposals. It reads: "It shall be "the duty of every local authority to consider the housing con-"ditions in their district and the needs of the district with respect "to the provision of further housing accommodation . . .". It is conceded on the part of the Minister that land cannot properly be acquired under this Part of the Act unless it is required for housing accommodation for "the needs of the district", whatever that expression may properly mean, and it is on the construction of that expression that this case turns.

I pause to point out that the point taken on the appeal is really only a technical one. If the contention of the appellant be right, then, in so far as the land was required for the purposes of housing accommodation for people in Portsmouth, Portsmouth Corporation could undoubtedly have acquired it, and if they had done so no objection could have been made; so that it is merely a question whether, in this particular case, the right local authority have come forward to acquire the land and provide the housing accommodation. Of course, it is important, when powers of this sort are being used, that they should be used in accordance with the proper construction of the relevant Act, and the appellant is therefore perfectly entitled to challenge the compulsory purchase order in this court. It is equally important that a reasonable interpretation should be given to the provisions of an Act of this kind, so that its scheme and object will not become defeated by purely technical considerations.

The case for the appellant is that the expression " the needs " of the district " means, and must be confined to the needs of persons living in the district at the time of the compulsory purchase order. That appears to me to be too narrow an interpretation to be put reasonably on the words as used in s. 71. I think that a local authority, when considering what the needs of their district are with regard to housing accommodation, must look to a rather wider horizon than that of the people who are living there at any particular moment. Indeed, as the Solicitor-General has pointed out, s. 74, sub-s. 2, seems in terms to contemplate that, for it gives power to a local authority to acquire land notwithstanding that it is not immediately required for the purpose of housing accommodation, so long as it is likely to be required within ten years. Moreover, I do not think that it is reasonable for any local authority, when they are considering the question of housing accommodation, to regard themselves as having a watertight district with boundaries like those of sovereign states, or to look on any person resident in their district as owing some sort of allegiance to them, and on themselves as having no concern with anybody who is outside that allegiance. The boundaries may have been artificially drawn. It cannot be right, for example, that in considering the needs of a district a local authority should stop short at a street which is immediately beyond their district and which is badly overcrowded and the inhabitants of which might more conveniently be rehoused on the other side of the boundary. It seems to me that a local authority must, when considering the needs of their district, look at the districts immediately adjacent. The Act speaks not of the needs of the people in the district, but of the needs of the district, and I think that that is a deliberate and sensible distinction. A local authority whose district is, say, a suburban area outside a big central town, might properly decide that, as people were wanting to come to live in their district, and as they had a long and growing waiting list of those requiring houses who wanted to leave the central town for one reason or another and to live in their district, therefore their district needed more houses. That would be a sensible and reasonable interpretation to put on the expression "the needs of the district", and I think that it is the right interpretation to put on those words as used in s. 71.

Accordingly, it is not, in my judgment, outside the proper purview of this urban district council, in providing this housing accommodation, to have regard to the fact that in part they would be providing for people who are at present living in Portsmouth, but who desire, or who will more easily find, housing accommodation in the district of Havant.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Gordon Gardiner, Carpenter & Co., for John R. C. Miller, Portsmouth; The Solicitor, Minister of Health.*

P. B. D.

1951
July 7; 24.

Lord Goddard, C.J., Hilbery and Ormerod, JJ.

REX *v.* TORQUAY LICENSING JUSTICES.
Ex parte BROCKMAN.

Licensing—Application for new licence free from restrictions—Justices' declared policy of unwillingness to grant full licences in place of restricted ones—Regularity—Duty of justices to hear and determine each application on merits.

In 1948 the licensee of an hotel was granted a restricted licence for the sale of intoxicating liquor for a period of three and a quarter years. At an adjourned general annual licensing meeting in 1950 the chairman of the local licensing justices announced that in the future circumstances would have to be very exceptional before the justices would grant full in place of restricted licences. The licensee applied in 1951 for a new licence free from restrictions, and in dismissing his application the chairman of the justices said that the bench had carefully considered it but were not prepared to alter their policy for the table licences as granted, and would only renew the licence on the same terms as before.

On the licensee's application for an order of mandamus requiring the justices to hear and determine his application according to law on the ground that the justices had laid down a predetermined rule about the granting of full licences and had failed to decide his application on its merits:—

Held, that the justices were entitled to determine that as a general rule they would look with disfavour on applications by holders of a restricted licence for its replacement by a full licence and would consider in such a case that a very considerable onus was thrown on the applicant; that they were nevertheless bound to hear each application and to decide whether on its individual facts there was enough to take it out of the general rule which they had laid down; but that, as the justices had in fact taken that course and had decided that on the facts before them they saw no reason to alter their general policy, the application failed.

APPLICATION for an order of mandamus.

William James Brockman, the manager and licensee of the Rosetor Hotel, Torquay, sought an order of mandamus requiring the Torquay licensing justices to hear and determine according to law an application by him for a new justices' licence. The grounds of the application were that the justices, on February 8, 1951, had refused his application for a new licence free from the condition that there should be no bar on the hotel premises, a condition which had been attached to the licence granted to the applicant in 1948 for three and a quarter years; that the justices refused the application because they had laid down a predetermined rule that full licences would not be granted in place of restricted licences; and that they failed to decide the application on its merits and were prevented from so doing by reason of that rule.

In 1948 the applicant was granted a licence for the sale of intoxicating liquors at the Rosetor Hotel for a period of three and a quarter years, and a condition was attached that liquor should only be supplied to residents and to those taking bona fide meals at the hotel and that there should be no bar on the premises. At an adjourned general annual licensing meeting held on March 6, 1950, the chairman of the licensing justices said that, in the future, circumstances would have to be very exceptional before they would grant full in place of restricted licences; that it was the unanimous opinion of the bench that as licensing justices they had treated residential hotels very generously in the past; that applicants applied for restricted licences saying that they would meet their ends; and that the justices felt that they were not receiving reciprocal treatment in the continual attempts to get full licences in place of restricted ones.

In dismissing the application on February 8, 1951, the chairman of the justices said: "The bench carefully considered the "application but is not prepared to alter the policy for the table "licences as granted. The licence for the Rosetor Hotel will be

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"renewed on the old terms". The chairman's affidavit stated that the justices had been fully advised by their clerk that it was illegal for them to lay down any hard-and-fast rule with regard to these applications, and that they were fully aware that each application must be heard and judged solely on its individual merits; that they had heard counsel on both sides and had retired and fully considered the matter; and that they were of the opinion that the needs of the public were not such as to justify them in renewing the licence with the deletion of the "no bar" clause.

Raymond Stock for the applicant. The justices laid down a predetermined rule about the granting of full licences in place of restricted ones, and they failed to consider the application on its merits. There is a clear distinction between a case where justices say that in future they will in the exercise of their discretion require a certain standard before giving a full licence, and one where they say that they will not give a licence at all to a certain class of persons. The latter is tantamount to saying that the justices' discretion will be withheld from a certain class of persons: see *Rex* v. *Rotherham Licensing Justices; Ex parte Chapman* (1), where it was held that it was the justices' duty to hear and determine every application according to law and not according to some fixed rule or principle. The justices must apply their unfettered discretion to each case before them.

[LORD GODDARD, C.J. The ratio decidendi of *Rex* v. *Rotherham Licensing Justices; Ex parte Chapman* (1) was that the justices did not have regard to the merits of the particular application.]

But here the justices said that the circumstances would have to be very exceptional before they would depart from the rule which they had laid down.

[LORD GODDARD, C.J. Every bench of justices has some sort of policy with regard to licensing applications.]

But this was not the sort of policy considered in *Rex* v. *Holborn Licensing Justices; Ex parte Stratford Catering Co. Ld.* (2), where the justices considered that unless a licensee were entitled to at least three months' notice he had an insufficient interest in the licensed premises to justify granting a transfer to him. It is submitted on the authority of *Rex* v. *Rotherham Licensing Justices* (1) that the justices here laid down an inflexible and dangerous rule, and that the applicant is accordingly entitled to an order of mandamus.

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(1) (1939) 55 T. L. R. 718.

(2) (1926) 42 T. L. R. 778.

Curtis-Bennett, K.C., and *Field-Fisher* for the justices. There is authority for the proposition that justices may have a general rule about licensing matters and that if they have a general rule it is right that they should make it public so that the persons concerned may know of it: *Rex* v. *Holborn Licensing Justices; Ex parte Stratford Catering Co. Ld.* (2). There the applicant sought the transfer of a licence and the justices thought it right that as a general rule they would consider the licensee's security of tenure, and that a period of three months' notice was usually desirable. Lord Hewart, C.J., said (3): ". . . I think "it would be a strong thing to say that the justices may not "entertain a certain minimum period . . . and, if it is the fact "that justices have in their mind some normal typical standard "period of notice, it is well that they should make that circumstance known rather than apply it without notice . . .". In the present case the justices considered the application on its merits and they behaved quite properly in making a general rule and informing the public that they had done so.

Rex v. *Rotherham Licensing Justices* (4) is quite a different case. There the justices did not hear the evidence; they refused the application without giving reasons and without hearing what the police had to say about the application. The Licensing (Consolidation) Act, 1910, by s. 14, sub-s. 5, provides that, on the confirmation of a new justices' on-licence, the confirming authority may, with the consent of the justices authorized to grant the licence, vary any conditions attached to the licence under the provisions of that section. This applicant, however, was content to apply for confirmation of his licence without asking that the conditions attached to it should be removed.

[Hilbery, J. I have difficulty in making *Rex* v. *Holborn Licensing Justices* (2) live harmoniously with *Rex* v. *Rotherham Licensing Justices* (4).]

In *Rex* v. *Rotherham Licensing Justices* (4) Humphreys, J., was relying on the words expressly referring to occasional licences; he said that the justices did not consider the merits of the application, although the justices in their affidavit had stated that they did.

Stock in reply. It is not possible to distinguish the present case from *Rex* v. *Rotherham Licensing Justices* (4) on the ground that there the application was for an occasional licence.

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(2) 42 T. L. R. 778.

(3) Ibid. 780.

(4) 55 T. L. R. 718.

[LORD GODDARD, C.J. Surely the distinction is that in the *Rotherham* case (4) the justices fettered their discretion by saying that they would not grant more than a certain number of occasional licences each year; while the ratio decidendi of the *Holborn* case (5) was that the justices had merely made rules for their own guidance.]

[Counsel referred to *Reg.* v. *Walsall Justices* (6).] In *Sharp* v. *Hughes* (7) the sole question turned on the presence of prostitutes on licensed premises. Williams, J., said (8) that if the justices had laid down some rule that the mere fact of the frequent serving of prostitutes was always a good ground for refusing a licence, their decision might have been open to the objection that their refusal to grant a licence was not a judicial decision and that to lay down any such hard-and-fast rule would be inconsistent with anything like a judicial decision.

The true distinction is between laying down a general rule which guides the exercise of the discretion, and laying down a rule which excludes the exercise of discretion.

Cur. adv. vult.

July 24. LORD GODDARD, C.J., read the following judgment of the court:—Mr. Stock has argued that it is clear that in 1950 the justices laid down for themselves a rule that they would not grant any licence without conditions where they had previously granted a restricted licence, and that they were not entitled to limit their discretion in this way and to say that they would only depart from it in very exceptional circumstances, and he contended that this case was in effect covered by the decision of this court in *Rex* v. *Rotherham Licensing Justices; Ex parte Chapman* (4).

The present case is not without importance because, in effect, it challenges the right of licensing justices to lay down for themselves a policy, or at least to announce that they have such a policy, but it would seem clear that if the justices have decided upon a policy to guide them in considering applications it is only fair that they should make it public so that applicants may know what to expect. That there is no objection to justices deciding among themselves the general lines upon which they will exercise their judicial discretion has been recognized in a number of cases,

(4) 55 T. L. R. 718.
(5) 42 T. L. R. 778.
(6) (1854) 18 J. P. 757.
(7) (1893) 57 J. P. 104.
(8) Ibid. 105.

and the first to which we will refer is *Reg.* v. *Walsall Justices* (8), decided as long ago as 1854. There the justices had made it known that they would not hear applications for any new licences, and, when an application was made to them at the annual licensing meeting, they refused to hear what was to be urged on behalf of the applicant. The court held that the justices were not entitled to take up that position—that as the applicant wished to be heard he was entitled to be heard; but it is quite clear that the court considered that there was nothing wrong in the justices prescribing a policy for themselves, although they were bound to hear any application which a person was entitled to make and it would be for them to decide whether the general policy was to be applied in that particular case. Lord Campbell, C.J., said (9): "The justices cannot exercise the discretion reposed in them "unless they hear the facts and arguments which the applicant "is prepared to adduce". Erle, J., said (9): "There may have "been good reason why a general resolution, otherwise proper, "ought not to be applied in the case of this individual". The observation of that judge seems to contain the kernel of the matter: the justices cannot make a rule to be applied in every case without hearing it. They may lay down for themselves a general rule but are bound to consider whether it is applicable to any particular case.

A more modern case is *Rex* v. *Holborn Licensing Justices; Ex parte Stratford Catering Co. Ld.* (10). There an application was made for the transfer of a licence. It appeared that the justices had made a general rule that they would not permit a transfer to a person who had not an agreement entitling him to at least three months' notice to terminate his engagement, and they refused the particular application in question because the proposed transferee was liable to have his tenancy terminated at a month's notice. The justices had, however, considered the case, and this court came to the conclusion that they had not refused to transfer merely because they had laid down for their own guidance this general rule, but that they had in fact inquired into the merits of the particular case. Accordingly the court refused the mandamus. Salter, J., in his judgment, said (11): ". . . it is impossible to "prevent [justices], in the privacy of their own room, from "adopting any standard or practice which seems to them right, "and, if they do, I think it is both right and convenient that

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(8) 18 J. P. 757.
(9) Ibid. 757.
(10) 42 T. L. R. 778.
(11) Ibid. 781.

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Licensing
Justices.
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Brockman.

"they should state their practice publicly for the information of "all concerned. They must, of course, apply their minds "properly to the circumstances of each particular case", which again shows that there is nothing wrong in justices' laying down a line of policy for themselves, provided that they consider whether a particular case before them calls for the application of that policy.

Turning now to *Rex* v. *Rotherham Licensing Justices* (12), the facts there were these: an application was made to the justices for an occasional licence, which they refused. The chairman filed an affidavit in which he said that the justices had adopted a rule that in considering applications for occasional licences they would seriously challenge the existence of special circumstances whenever an application was made on behalf of the same organization on more than two occasions in any period of twelve months, but that they would not exclude from their consideration the existence of special circumstances. He added that they had refused the application on its merits and that, in arriving at the decision, they were impressed by the answer given by the secretary of the company, when asked what was the special requirement for a liquor licence, that a dance cannot be made to pay without a bar. They added that in their opinion the purpose of an occasional licence is to add a reasonable amenity to an already planned function, and not to provide the promoters of the function with a means of making money from the sale of liquor in order to offset the financial loss incurred in running the function without such an additional amenity.

The court in that case granted a mandamus and distinguished it from *Rex* v. *Holborn Licensing Justices* (13). A careful perusal of the judgments, more especially that of Humphreys, J., makes clear, I think, the ground upon which the mandamus was ordered. The combined effect of s. 64 of the Licensing Act, 1910, and s. 13 of the Revenue Act, 1862, is that occasional licences are to be granted by the Commissioners of Inland Revenue subject to the consent of two justices whenever they shall consider it conducive to public convenience, comfort and order to do so. No doubt the justices whose consent has to be obtained have to consider exactly the same matters as the Commissioners of Inland Revenue. The justices in the *Rotherham* case (12) did not consider whether the occasion was one on which it would be conducive to public convenience to grant an occasional licence.

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(12) 55 T. L. R. 718.

(13) 42 T. L. R. 778.

What they said, in effect, was that while they would grant an applicant a licence on two occasions they would not grant him one on a third. That is bringing into consideration matter outside the Act altogether. If it is conducive to public convenience, comfort and order that an occasional licence should be granted, it matters not whether the applicant has on one or more occasions applied for a licence or whether the result of granting a licence would be that the occasion would result in a profit instead of a loss.

Humphreys, J., said in terms (14): "I by no means desire "to whittle away the powers which, in my opinion, licensing "justices undoubtedly possess to make certain general rules", and after referring to the *Holborn* case (15) went on, "but with "regard to occasional licences, seeing that they are to be granted, "subject to the consent of two justices, in effect by the officers "of excise and with the approval of the Commissioners of Inland "Revenue, whenever they shall consider it conducive to public "convenience, comfort or order to do so, I myself very much "doubt whether the justices ought, or have power, to say in "advance: 'We shall consider it not conducive to public order, "'etc., in certain circumstances'". Later on he said: "I think "that it is plain that in fact the justices did not consider the "merits of the particular application, but regarded themselves as "being required to start their consideration of the case by paying "attention to a rule that normally there should only be two, and "no more, grants of occasional licences to any applicant in "respect of an entertainment or entertainments promoted by the "same promoters". It appears to us that the justices in that case took into account an entirely irrelevant consideration. They had to consider the occasion for which the licence was to be granted, and the number of times the particular proposed licensee had applied for a licence was really immaterial. Of course, if the justices consider that the real reason for applying for an occasional licence is not the comfort or convenience of the public but merely a desire of the applicants to make money by the sale of liquor on the occasion, that would be a ground for refusing, and constant applications made by or on behalf of the same persons or organization may afford grounds for coming to that conclusion.

In the present case in our opinion no fault can be found with the justices' determining that, as a general rule, they would look with disfavour on persons who had come before them and obtained a restricted licence and who subsequently applied for a full licence, and would consider that in such a case there was a very considerable onus thrown upon the applicant. We think that that is well within their powers; but, when an application is made, in respect of premises which have hitherto held a restricted licence, for one without conditions, the justices are bound to hear it and to consider whether, on the facts of the particular case, there is enough to take it out of the general rule which they have laid down. That is what we think that the justices did in the present case. Their decision was not very happily worded, but we think, accepting as we do the affidavit of the chairman, that they meant to decide that they were not prepared to alter in the particular case before them the general line of policy which they had laid down in this class of case.

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(14) 55 T. L. R. 718, 720.

(15) 42 T. L. R. 778.

For these reasons in our opinion the application fails and should be dismissed with costs.

Application refused.

Solicitors: *Wood, Nash & Co., for Kitsons, Easterbrook & Co., Torquay; J. E. Lickfold & Sons, for Carter, Fisher & Co., Torquay.*

S. C.

1951
July 25.

Lord Goddard, C.J., and Ormerod, J.

STEWART *v.* CHAPMAN.

Road Traffic—Driving without due care and attention—Notice of intended prosecution—Service "within fourteen days of the commission of the offence"—Date of offence to be excluded—Service by registered post—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 12 *and* 21.

In calculating the fourteen days within which the notice of an intended prosecution must be served under s. 21 of the Road Traffic Act, 1930, the date of the commission of the offence is to be excluded.

The Goldsmiths' Company v. *The West Metropolitan Railway Co.* [1904] 1 K. B. 1 followed.

If the notice is served by registered post it must, in order to comply with the section, be posted at such a time that in the ordinary course of post it would reach the defendant before the expiration of the fourteen days.

CASE STATED by Middlesex justices.

An information was preferred by a police constable against Peter John Chapman alleging that he had on January 11, 1951, driven a motor car along a road at Edmonton without due care and attention, contrary to s. 12 of the Road Traffic Act, 1930.

At the hearing of the information, immediately after the defendant had pleaded not guilty and before evidence for the prosecution was called, it was submitted as a preliminary point on behalf of the defendant that the notice of intended prosecution had not been served on the defendant within fourteen days of the commission of the offence in accordance with s. 21 of the Road Traffic Act, 1930 (1), inasmuch as although the alleged offence was committed at 7.15 a.m. on January 11, 1951, the prosecutor did not send the notice of intended prosecution by registered post until 1 p.m. on January 24, and it was not delivered to the defendant until January 25 at about 8 a.m.

No evidence was called by either side, and it was contended on behalf of the defendant that "sent" meant dispatched, that it was sufficient if the notice were posted at a time when, in the ordinary course, it might properly have been expected to reach him before the expiration of the fourteen days, but that it had not been so posted as the fourteen days had expired on January 24, 1951.

It was contended on behalf of the prosecutor that the provisions of s. 21 had been complied with, since the notice was sent to the defendant by registered post on January 24, that was, within fourteen days of January 11; and that the period of fourteen days expired on January 25 and not January 24.

The justice dismissed the information on the ground that the notice of intended prosecution had not been sent by registered post to the defendant within fourteen days of the commission of the offence as the period of fourteen days expired on January 24, 1951.

The prosecutor appealed.

Vernon Gattie for the prosecutor. The appeal raises two points: first, whether in calculating the fourteen days within which the notice has to be served on the defendant the date of the commission of the offence is to be included or excluded; and secondly, whether the notice is "sent" within time if it is posted on the fourteenth day or whether it must be posted so that in the ordinary course of post it will arrive by the fourteenth day.

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(1) The Road Traffic Act, 1930, s. 21: "Where a person is prosecuted "for an offence under any of the pro"visions of this Part of this Act rela"ting . . . to careless driving he "shall not be convicted unless . . . "(b) within fourteen days of the com"mission of the offence a summons "for the offence was served on him; "or (c) within the said fourteen "days a notice of the intended prose"cution . . . was served on or sent by "registered post to him . . .".

There is authority both ways on the first point, but it is submitted that the result of the authorities is that the date of the commission of the offence is to be excluded. It is to be noted that the proviso to s. 21 states that the requirement of the section shall in every case be deemed to have been complied with unless and until the contrary is proved: *Rogerson* v. *Edwards* (2). The law takes no notice of a part or parts of a day, and this supports the contention that the date of the offence should be excluded. In *The Goldsmiths' Company* v. *The West Metropolitan Railway Co.* (3) it was held that it was then well established that the day of the doing of an act was to be excluded in computing the running of time.

As regards the second point, the meaning of the word "sent" in s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899, was considered in *Retail Dairy Co. Ld.* v. *Clarke* (4); and it was there said that it must be construed as bearing its ordinary meaning of dispatched, so that a document was "sent" within seven days of an event if it were posted within that time even though it did not reach the addressee until after the expiration of seven days.

[LORD GODDARD, C.J. Section 26 of the Interpretation Act, 1889, is relevant on this point.]

Yes. In *Stanley* v. *Thomas* (5) it was held that in the absence of bad faith s. 21 was complied with if a notice was sent so that in the ordinary course of post it would reach the addressee within the time specified by the statute.

[LORD GODDARD, C.J. None of these cases is really on the main point in this case—whether the date of the offence has to be taken into account.]

They do so only by inference, as in *Stanley* v. *Thomas* (5), where if September 8 was to be included, the time would have expired on September 21; but the court gave no decision on the point. The only modern case is *Holt* v. *Dyson* (6). There the person to whom the notice was to be sent was in hospital, and the police knew that fact but still sent the notice to her private address. The accident was on November 17; the notice was sent on November 28. It seems that the court there thought that the period was exclusive of the first day, as the court said that the notice was not sent until three days before the fourteen days were due to expire. There are many cases of considerable antiquity on the computation of time.

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(2) [1951] W. N. 101.
(3) [1904] 1 K. B. 1.
(4) [1912] 2 K. B. 388.
(5) [1939] 2 K. B. 462.
(6) [1951] 1 K. B. 364.

J. L. Elson Rees for the defendant. The rule seems to be that when the computation of time is to be from an act done, the day of the doing of the act is included, but where time is to run from a certain day, that day must be excluded. The words of s. 21 are "within fourteen days of the commission of the offence" and not "within fourteen days after the offence": *Rex* v. *Adderley* (7) and *Bellasis* v. *Hester* (8). In the latter case a bill was payable ten days after sight, and it was argued that the day of sight should be excluded, but the court held that the day of sight should be reckoned as one of the ten. Lord Mansfield adopted that rule in *Rex* v. *Adderley* (7).

[LORD GODDARD, C.J. That distinction seems to have obtained in Lord Mansfield's day, but not afterwards. It was rejected in *Lester* v. *Garland* (9), and the court in *The Goldsmiths' Company* v. *The West Metropolitan Railway Co.* (10) said that the rule was established that where a particular time was given from a certain date for the doing of an act, the day of the date was to be excluded.]

The *Goldsmiths' Company* case (10) is distinguishable from the present one. This is a penal matter, and the section should be construed in favour of the defendant. [Counsel also referred to *Radcliffe* v. *Bartholomew* (11) and *Russell* v. *Ledsam and Others* (12).]

LORD GODDARD, C.J. When the case was heard by the justices a preliminary point was taken on behalf of the defendant that notice of the intended proceedings had not been given within fourteen days of the commission of the offence. No evidence was called on either side about that, and the facts were apparently accepted. It is just as well that I should once more remind justices that the onus is on the defendant if he wishes to set up this point, but I think that there can be no doubt in this case that the prosecution accepted the statement of facts which was

(7) (1780) 2 Dougl. 463.
(8) (1698) 1 Ld. Raymond 280.
(9) (1808) 15 Ves. 248.
(10) [1904] 1 K. B. 1.
(11) [1892] 1 Q. B. 161.
(12) (1845) 14 M. & W. 574.

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given by or on behalf of the defendant. On those facts the justices held that the notice had not been given within due time and therefore gave effect to the preliminary point and dismissed the information.

[His Lordship stated the facts and continued:] It is argued that as the notice was not delivered to the defendant until January 25, at 8 a.m., more than fourteen days had elapsed and therefore the notice was out of time. Mr. Gattie argued that even if January 25 was not the fourteenth day, the notice was given in time because it had been posted on the previous day; but I think that that would be wrong. The words of the section are: "within the said fourteen days a notice of the intended prosecution . . . was served on or sent by registered post to him ". I think that it is not enough to post the letter within the fourteen days; it must be posted within such time that in the ordinary course of post it would reach the person to whom it is addressed within the statutory time. I think that is clear, because it is not intended that there should be any longer time allowed to the prosecution if they post the document than if they serve the document.

Further, it seems to me that s. 26 of the Interpretation Act, 1889, puts the matter beyond all doubt, because it provides: "Where an Act passed after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve', or the expression 'give' or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post".

Therefore if there is any doubt about these cases the prosecutors, who are in most cases the police, should understand that if the notice is to be served by post it must be posted at such a time that in the ordinary course of post it will reach the defendant before the expiration of the fourteen days.

The real point, however, is whether, in calculating the fourteen days, the date of the commission of the offence is to be included; and on that subject a considerable number of cases have been cited.

In my opinion there is no doubt how that matter has to be decided at the present time. In the eighteenth century, when courts were much given to making fine distinctions, a distinction seems to have been drawn in cases—to use the language of Sir Richard Henn Collins, M.R., in *The Goldsmiths' Company* v. *The West Metropolitan Railway Co.* (13)—between a term created which commences with the first day of the term, as in the case of a lease, and a time limit from a fixed date for the doing of an act.

Mr. Rees, whose industry has caused him to look up several of the old cases, has very properly called our attention to two cases decided, no doubt, by judges of high authority: *Bellasis* v. *Hester* (14), in about 1697 or 1698; and *Rex* v. *Adderley* (15), a case in which Lord Mansfield gave the judgment of the court. Those cases did draw the distinction to which I have just referred, but in my opinion they must now be taken to be overruled. They have been consistently disregarded even since the rule, if there was one, was broken into by Sir William Grant, M.R., in *Lester* v. *Garland* (16). That was the first case in which the question whether there was to be a fixed rule on this subject or not really arose. Hitherto general rules had no doubt been laid down, but in *Lester* v. *Garland* (16) the Master of the Rolls departed from those rules, or at any rate said that he was not going to follow those general rules in the future. He referred especially to *Rex* v. *Adderley* (15), and then he said, before referring to that rule (17): "It is said for the plaintiffs, that upon this subject a "general rule has been by decision established; that, where the "time is to run from the doing of an act, (and for the purpose of "this question it must extend to the happening of an event) the "day is always to be included. Whatever dicta there may be to "that effect, it is clear the actual decisions cannot be brought "under any such general rule". He then reviewed many of the decisions, and continued (18): "It is not necessary to lay down "any general rule upon this subject; but upon technical reasoning "I rather think it would be more easy to maintain that the day "of an act done, or an event happening, ought in all cases to be "excluded, than that it should in all cases be included". That was the first case in which the rule, if there was one, was definitely broken into, at least to the extent of saying that the courts would not follow this rule in all cases.

Lester v. *Garland* (16) was decided in 1808. In *Young* v. *Higgon* (19) there is a judgment of Parke, B., in which the other members of the court, Alderson, Gurney and Rolfe, BB., concurred, and they refused to be bound by such rule. Having referred to *Rex* v. *Adderley* (20) and to an earlier case, *Castle and Another* v. *Burditt* (21), Parke, B., said (22): "But since those "decisions, the subject has been much considered in the case of "*Lester* v. *Garland* (16), which introduced a new view of the "question. I do not say that that case is precisely in point with "the present: but looking at the elaborate judgment of the "Master of the Rolls, in which all the authorities are collected "and commented upon, I should feel little difficulty in saying "that the day in this case ought to be reckoned exclusively, on "the authority of that case alone". He reviewed many of the other cases, and continued (23): "In *Webb* v. *Fairmaner* (24), "in which almost all the authorities are cited, this court held, in "conformity with the decisions just referred to, that where a "party bought goods to be paid for in two calendar months, the "day of the sale should be reckoned exclusively in computing "the time. That case has been followed up by the decisions of "the Court of Queen's Bench in the two cases of *Reg.* v. *Justices* "*of Shropshire* (25) and *Blunt* v. *Heslop* (26), so that the point "may now be considered as settled by a course of recent "decisions, all proceeding upon the same principle, that the day "from which the computation is made ought, in cases like the "present, to be excluded; and such appears to me to be the "reason and good sense of the matter".

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(13) [1904] 1 K. B. 1.
(14) 1 Ld. Raymond 280.
(15) 2 Dougl. 463.
(16) 15 Ves. 248.
(17) Ibid. 254.
(18) Ibid. 257.
(19) (1840) 6 M. & W. 49.

In 1845 that case was again considered in *Russell* v. *Ledsam and Others* (27). There Parke, B., said (28): "The usual course "in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given "event or date".

Those cases were all considered by the Court of Appeal in *The Goldsmiths' Company* v. *The West Metropolitan Railway Co.* (29) in 1903; and it was in that case that the Master of the Rolls stated the two conflicting views that had been taken, according to whether a term was created which commenced with the first day of the term, as in the case of a lease, and a time limited from a fixed date for the doing of an act. He held that it was now well established that, whatever the expression used, the day of the

(16) 15 Ves. 248.
(20) 2 Dougl. 463.
(21) (1790) 3 T. R. 623.
(22) (1840) 6 M. & W. 49, 52.
(23) Ibid. 54.
(24) (1838) 3 M. & W. 473.
(25) (1838) 8 A. & E. 173.
(26) (1838) 8 A. & E. 577.
(27) (1845) 14 M. & W. 574.
(28) Ibid. 582.
(29) [1904] 1 K. B. 1.

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doing of the act was to be excluded. Mathew, L.J., put it very succinctly and shortly in his judgment; he said (30): "The true "principle that governs this case is that indicated in the report "of *Lester* v. *Garland* (31), where Sir William Grant broke away "from the line of cases supporting the view that there was a "general rule that in cases where time is to run from the doing "of an act or the happening of an event the first day is always "to be included in the computation of the time. The view "expressed by Sir William Grant was repeated by Parke, B., in "*Russell* v. *Ledsam* (32), and by other judges in subsequent "cases. The rule is now well established that where a particular "time is given, from a certain date, within which an act is to be "done, the day of the date is to be excluded".

That case, which is binding on this court, seems to me entirely to apply to the words of this section. This letter was received on the morning of January 25. It follows, in my opinion, that the notice was served in time, and accordingly this appeal must be allowed. The case must go back to the justices with an intimation that the notice was served in time and a direction to them to continue the hearing of the case.

ORMEROD, J. I agree.

Appeal allowed.
Case remitted.

Solicitors: *The Solicitor, Metropolitan Police; Ponsford & Devenish.*

S. C.

(30) [1904] 1 K. B. 1, 5.
(31) 15 Ves. 248.
(32) 14 M. & W. 574.

1951
June 13.

Lord Goddard, C.J., Lynskey and Devlin, JJ.

WILSON *v.* INYANG.

Medicine—Non-registered medical practitioner—Use in advertisement of title "physician"—Defendant's genuine belief in right so to act — Question of fact for magistrate — Unreasonableness of belief evidential not conclusive—Medical Act, 1858 (21 *&* 22 *Vict.* c. 90), s. 40.

When a non-registered medical practitioner is charged with having wilfully and falsely used one of the titles or descriptions prohibited by s. 40 of the Medical Act, 1858, it is a question of fact to be determined by the court of summary jurisdiction whether the defendant was acting bona fide in describing himself as he did because he had an honest belief that he was entitled to do so; and though, generally speaking, the court will find as a fact that, if the defendant had no reasonable ground for his belief, that belief was not honest, it is not bound as a matter of law so to find.

Younghusband v. *Luftig* [1949] 2 K. B. 354 explained.

Case stated by the metropolitan magistrate sitting at West London magistrates' court.

At a court of summary jurisdiction sitting at West London informations were preferred by Eric Charles Wilson, on behalf of the Medical Defence Union Ld., against Okon Asy Inyang alleging respectively that on June 30, 1950, at South Kensington he wilfully and falsely used the title of physician, and wilfully and falsely used the description of physician, in each case contrary to s. 40 of the Medical Act, 1858.

On the hearing of the informations the following facts were proved or admitted:—On June 25, 1950, the defendant handed in to the South Kensington office of a weekly newspaper, called the Middlesex Independent and West London Star, the written draft of an advertisement in the following terms: "Naturopath "Physician, N.D., M.R.D.P. Patients visited; also evening "surgery for chiropody. For appointment—'Phone Park 7203"; and applied to a representative of the newspaper to have the advertisement inserted on four occasions at fortnightly intervals. The advertisement duly appeared in the issue of the newspaper dated June 30, 1950, in those terms except that the initials "M.D." appeared instead of "N.D.". The use of the letters M.D. in the advertisement was due to a mistake made by the servants of the newspaper. The defendant at all times intended the letters N.D. to appear.

The defendant was an African and had lived in England for about two years. He was not, and at no time had been, a registered medical practitioner. Before June 30, 1950, he had obtained the diploma of the Anglo-American Institute of Drugless Therapy. To obtain this he had first undergone a course of instruction which consisted partly of a correspondence course and partly of practical training. The practical training was given to the defendant at a clinic in Bournemouth, where there were about thirty beds for in-patients and an out-patients' department. The defendant attended there for six months. He then sat for examination before obtaining the diploma, and wrote about six papers. He paid 20*l*. for his postal and practical instruction, examination and diploma. He did not know whether the person who instructed and examined him had professional qualifications or not, and made no inquiries about the status or competence of the institute. After he had obtained the diploma he obtained a certificate of membership of the British Guild of Drugless Practitioners. The diploma and certificate were both signed by one Dr. Brown Neil.

It appeared from paras. 5 and 6 of the rules of the guild that passing an examination was not a condition precedent to membership of it, and that persons might be admitted members of whose knowledge and training the guild had no knowledge. Copies of a quarterly magazine supplied to defendant by the guild contained articles on the subject of drugless therapy, many apparently written by registered medical practitioners. The defendant had seen the human body anatomically disposed, but had not witnessed or practised dissection. He had never treated any patient, none having ever applied to him for treatment, but genuinely believed himself, by reason of the course of instruction above referred to, to be qualified to diagnose diseases as limited by his field of study, and to relieve some of these in their early stages by minor manipulation and by prescribing exercises and diet.

For the prosecutor it was contended that, even if the defendant believed that he was qualified to practise in medicine, he had no reasonable grounds for that belief.

For the defendant it was contended that mens rea was a necessary ingredient of the offence, and that he should not be convicted of wilfully and falsely contravening the Act of 1858 if he genuinely and reasonably believed that he was qualified to practise in medicine; and that regard must be had to his background and experience in deciding whether he had reasonable grounds for that belief.

The magistrate was of opinion that the use of the title or description "physician" in the advertisement would constitute an offence if used wilfully and falsely by the defendant; that he genuinely believed that he was entitled so to entitle or describe himself; and that, while no person brought up and educated in England could reasonably believe that the course of instruction and examination by the institute and membership of the guild would authorize him to entitle or describe himself as a "physician", the defendant, because he was an African brought up in Africa, who had only lived in England for two years, acted reasonably in believing that his course of instruction, examination, diploma and guild membership qualified him so to entitle or describe himself. The magistrate accordingly held that the prosecutor had not discharged the burden of proof which lay upon him, and dismissed the informations. The prosecutor appealed.

J. R. Cumming-Bruce for the prosecutor.

The defendant did not appear and was not represented.

LORD GODDARD, C.J. [after reviewing the facts and commenting on their suspicious nature]. I do not profess to understand the reasoning of the magistrate; but, as he saw the defendant and heard him cross-examined, it would be impossible for us to say that there was no evidence on which he could come to his conclusion of fact. Mr. Cumming-Bruce has invited us, on behalf of the prosecution, to say that the magistrate was bound to convict in this case because his findings, taken as a whole, amounted to a finding that the defendant had no reasonable ground for his belief. The magistrate has held, as I understand his finding, that, though he would not have said in the case of a European that he had reasonable grounds for his belief, he thinks that this African person had reasonable grounds for his belief.

What is the law on the subject? The books are full, as everybody knows, of cases under the Medical Act, and one may be allowed to express the hope that some day the General Medical Council will take steps to get another Act of Parliament which will clear up the anomalies and difficulties which the courts have found in applying the relevant statutory provisions to this class of fact. In *Younghusband* v. *Luftig* (1) a court of five judges assembled in an endeavour to clear up what Henn Collins, J., later Master of the Rolls, had described as a " complete fog ". The " complete fog " surrounded the question whether or not the issue was one of law or of fact. In *Younghusband* v. *Luftig* (1), in an endeavour to give a decision which might be useful and authoritative in the future, we reviewed the whole of the cases which had been decided on this subject, beginning with *Ladd* v. *Gould* (2). That is to say, we considered all the cases decided between 1860 and 1899 and the two or three which have been reported since 1899.

The court came to the conclusion that the balance of authority, in fact an unbroken line of authority, is, to quote the headnote in the The Law Reports, to the effect that to commit an offence the defendant must have acted wilfully and falsely and that it is for

(1) [1949] 2 K. B. 354.

(2) (1860) 1 L. T. 325.

the magistrates to decide whether he has done so, and also that he does not commit an offence if he honestly believes that he was within his rights in describing himself as he did. In other words, the case came down to the question whether the defendant was acting bona fide in describing himself as he had because he had an honest belief that he was entitled to do so. It is true, and it is on this that Mr. Cumming-Bruce so strongly relies, that in giving the judgment of the court I went on to say (3): "He must "of course have a reasonable ground for his belief. A person "who has passed no examination and has received no qualifica-"tion from a genuine teaching body cannot adopt one of the titles "mentioned in the section and be heard to say that he believed "he had such skill as would entitle him so to describe himself. "We can sum up this part of the case by saying that there must "be mens rea and the presence or absence of that state of mind "must be tested on ordinary principles and in the light of "common sense".

I think it quite clear that what the court meant in the passage on which Mr. Cumming-Bruce relies is that the magistrate must apply ordinary principles and test the matter in the light of common sense; and, generally speaking, applying ordinary principles and in the light of common sense, he would say that if a defendant had no reasonable ground for believing what he said that he believed, he was not acting honestly.

But there may be exceptions: a man may honestly believe that which no other man of common sense would believe. If he has acted without any reasonable ground, and has refrained from making any proper inquiry, that is generally very good evidence that he is not acting honestly. But it is only evidence, and I do not think that it would be right for a moment to say that we qualified that part of our judgment in *Younghusband* v. *Luftig* (3), where we emphasized that the question for the magistrate was whether the defendant acted honestly by saying that he cannot have acted honestly if he had no reasonable grounds for his belief. What we were pointing out was that, in considering whether a defendant has acted honestly, the magistrate ought to take into account the presence or absence of reasonable grounds of belief. In this case it is obvious that the magistrate did take that into account, and he has given us his reasons for coming to the conclusion that this defendant did act honestly. Whether we should have come to that conclusion is neither here nor there, for we cannot disturb his conclusion if there was evidence on which he

(3) [1949] 2 K. B. 354, 369.

could arrive at it. He saw the defendant, heard his evidence, and formed an opinion as to his credibility and honesty. In view of his findings I do not think that the court can interfere, for to do so would be to ignore the real ratio decidendi of the judgment in *Younghusband* v. *Luftig* (3), which is that, whether a person acted honestly is a question of fact for the magistrate, and whether he acted reasonably or not is not the deciding feature.

I think that this appeal must be dismissed.

LYNSKEY, J. I agree.

DEVLIN, J. I also agree.

Appeal dismissed.

Solicitors: *Hempsons.*

S. C.

(3) [1949] 2 K. B. 354, 369.

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June 14, 15, 18.

Evershed, M.R., Jenkins and Birkett, L.JJ.

STUDHOLME *v.* MINISTER OF FUEL AND POWER.

[No. 4 of 1949.]

Nationalization—Gas—Compensation to holders of securities—Determination of values—" Relevant factors "—Gas Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 67), *s.* 25, *sub-ss.* 2, 10.

On the vesting date (May 1, 1949) a gas company's undertaking vested in the West Midlands Area Gas Board. The applicant was appointed stockholders' representative to represent the interests of holders of the company's securities in the determination of the compensation payable for those securities; and he and the Minister agreed the compensation values of the company's consolidated ordinary stock at 121*l.* per 100*l.* of stock and the compensation values of three other classes of their securities, but did not agree those of their 5 per cent. consolidated preference stock, and of their 4 per cent. and 4½ per cent. perpetual debenture stock. Accordingly, the applicant applied, by notice dated December 29, 1949, for the determination of the values of the preference and debenture stocks and, on November 11, 1950, the Gas Arbitration Tribunal gave their decision in the form of a special case.

The compensation values of the preference and debenture stocks were not determinable under s. 25, sub-s. 2, of the Gas Act, 1948, because they were not quoted in the Stock Exchange Official Daily List or Daily Supplementary List on any of the dates mentioned in that sub-section; nor were they determinable under sub-ss. 3, 4, 5 or 6, so that they were determinable under sub-s. 10.

Sub-s. 10 provides that the value of securities to which sub-ss. 2, 3, 4, 5 or 6 do not apply shall be the value agreed by the Minister and the stockholders' representative or, in default of such agreement, the value determined by arbitration under the Act, and that the tribunal, in determining the value, shall have regard to all relevant factors, including the value of securities to which sub-s. 2 applies (as determined under sub-s. 2) being securities which, as respects all matters affecting their value, are most nearly comparable to the securities the value of which the tribunal is determining.

The securities within the scope of sub-s. 2 "most nearly "comparable" as respects all matters affecting their value with the preference stock were the South Suburban Gas Company's and the Tottenham and District Gas Company's 5 per cent. preference stock; and with the 4 per cent. debenture stock, 4 per cent. debenture stocks of Bristol, Croydon, Tottenham and District and Wandsworth Gas Companies. There had not been any valuation under sub-s. 2 of any 4½ per cent. debenture stock of a statutory gas company.

The tribunal decided that for the purpose of s. 25 the real values were 115*l.* per 100*l.* of preference stock, 102*l.* 15*s.* per 100*l.* of 4 per cent. debenture stock, and 113*l.* 10*s.* per 100*l.* of 4½ per cent. debenture stock; and that the value of securities within sub-s. 10 was to be decided primarily by reference to the value of "comparable "securities" not on May 1, 1949, the vesting date, but as determined by sub-s. 2, so that the relevant date would be either in July, 1945, just before the general election, or in October, 1947, when the King's speech announced the introduction of the Gas Act.

The applicant contended that the tribunal should have referred to the values of the "comparable securities" at the vesting date; that, from the middle of 1945 until the vesting date, the prices of the company's securities and of the "comparable securities" were depressed by the threat of nationalization which followed the result of the election; that, but for that threat, those prices would have increased during the period from the middle of 1945 until the vesting date as greatly as did those of industrial securities not threatened by nationalization; that that was a "relevant factor" within sub-s. 10 which the tribunal should have considered; and that therefore the compensation values of securities to be valued under sub-s. 10 were to be the values which they would have had on the vesting date had nationalization of the industry not been pending.

The tribunal considered that, even if they ought to have valued the securities as at the vesting date, the impending nationalization was not a factor for them to consider, as to do so would have been to give to them a hypothetical value which they had not; nor, in their view, was the applicant's and the Minister's agreement that the compensation value of the company's ordinary stock was 121*l.* per 100*l.* a "relevant factor."

The questions, in the case stated, for the determination of the Court of Appeal were (1.) whether the compensation values under s. 25 were to be assessed on May 1, 1949; (2.) whether they were to be assessed on the basis that the gas industry was not about to be nationalized; (3.) whether the Minister's having determined by agreement with the applicant a compensation value of 121*l.* per cent., for the consolidated ordinary stock was a "relevant factor" within sub-s. 10.

Held, (1.) that the tribunal correctly regarded the agreement of 121*l.* per cent. as the compensation value for the ordinary stock as irrelevant, since they had no evidence of the way in which that figure was reached or of the relevant considerations, so that it might have been very misleading had it been taken into account; (2.) that, since "relevant factors" meant actual facts or circumstances which might bear on the problem, the question what the price of stocks concerned would have been had the Gas Act, 1948, not been passed was, prima facie, not a "relevant factor"; (3.) that the pendency of the passing of the Act would have a bearing on the values and, in so far as it did, reduced them; but that, while the framers of the Act clearly thought that it might in some circumstances be necessary to provide that depreciation in values due to the passing of the Act should be off-set, there was in s. 25, sub-s. 10, no hint that the tribunal had to take that notion into account as a "relevant "factor" in valuing the securities; (4.) that the question "at "what date" the value ought to be taken was irrelevant, because the tribunal were arriving at the value by a particular process and were not called on so to do at any particular or specified date; that they had to see what the value of "securities . . . . most nearly "comparable" was, determinable by reference to the dates and methods specified in sub-s. 2; that, if the price of the securities "most nearly comparable" thus valued were a relevant circumstance, that negatived the notion that, in the case of unquoted securities, the tribunal were starting, from that terminus, to arrive at a value on the vesting date in May, 1949, and that that would have been a circumlocutory and deceptive way so to conclude, had that been Parliament's intention; (5.) that it was proper to assume that those to be compensated would be so, broadly, on the same basis whether their securities happened to have been, or not to have been, quoted on all the relevant dates; and (6.) that, for the ordinary case, the tribunal had adopted the correct method, laid down by Parliament. The answer to all three questions was accordingly in the negative, with the result that the appeal failed.

CASE STATED for the opinion of the Court of Appeal under ss. 63 and 64 of the Gas Act, 1948, by way of appeal from a decision of the Gas Arbitration Tribunal determining the values of the 5 per cent. consolidated preference stock, and the 4 per cent. and 4½ per cent. perpetual debenture stock of the former Dudley, Brierley Hill and District Gas Company.

On May 1, 1949 (the "vesting date"), the company's undertaking became vested in the West Midlands Area Gas Board established under s. 1 of the Act. The applicant was appointed stockholders' representative to represent the interests of holders of securities of the company in connexion with the determination of the amount of compensation payable in respect of those securities, and for the other purposes mentioned in s. 27 of the Act. He and the respondent (the Minister) agreed, under s. 25, sub-s. 10, of the Act (1), the compensation values of the consolidated ordinary

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(1) Gas Act, 1948, s. 25, sub-s. 1: "Every holder of securities of any "undertaker to whom this Part of this "Act applies, not being an undertaker "to whom s. 18 of this Act applies, "shall be entitled to be compensated "by the issue to him by the Gas "Council, in accordance with the provisions of the Second Schedule to "this Act, of British Gas Stock of "such amount as in the opinion of "the Treasury is at the vesting date "of a value equal to the value of the "said securities held by him, regard "being had (in estimating the value "of the stock so issued) to the market "value of government securities at or "about the vesting date . . .".

Sub-s. 2: "Where securities of any "class were quoted in the Stock "Exchange Official Daily List on all "six of . . . the 13th, 14th, 15th, 16th, "17th and 20th days of October, 1947, "and were also quoted in the said list "or in the Stock Exchange Daily "Supplementary List on any of the "following dates . . . the 15th day of "February, the 15th day of March, "the 16th day of April, the 15th day "of May, the 15th day of June and "the 16th day of July, 1945, the value "of securities of that class for the "purposes of this section shall, subject "to the provisions of this section and "the next following section, be "deemed to be either—(*a*) the average "of the mean of the quotations for "securities of that class appearing in "the said Stock Exchange Official "Daily List on the said dates in the "year 1947, or (*b*) the average of the "mean of the quotations for securities "of that class appearing in the said "Stock Exchange Official Daily List "or the said Stock Exchange Daily "Supplementary List or the said "dates in the year 1945 on which a "quotation therefor so appeared, "whichever is the higher . . .".

Sub-s. 3: "Where, in the case of "any class of securities to which the "last preceding subsection applies, "there has been at any time after the "last relevant quotation date a fresh "issue of securities of that class, the "value of every security of that class "for the purposes of this section shall, "instead of being determined under "the last preceding subsection, be "deemed to be the average of the "values of all the securities of that "class calculated on the basis that— "(*a*) the value of each of the securities "comprised in that issue is the price "at which it was issued, and (*b*) the "value of the remaining securities is "the value which those securities had "or would have had for the purposes "of this section immediately before "the issue took place".

Sub-s. 5: "Subject to the next following subsection, where a new "class of securities has been issued "at any time after the 20th day of "October, 1947, the value of securities "of that class for the purposes of this "section shall be deemed to be the "price at which they were issued, and "the last two preceding subsections "shall apply to any fresh issue or conversion of securities of that class".

Sub-s. 6: "Subsections (2), (3) and "(5) of this section shall not apply to "any securities issued at any time "after the 31st day of December, "1945, on terms and conditions "approved by the Minister and for "the purpose of raising money for "purposes so approved, and the value "of any such securities for the purposes of this section shall be deemed "to be the price at which they were "issued, and subsection (4) of this "section shall apply to any conversion "of those securities".

Sub-s. 7: "If securities to which "either of the two last preceding sub-"sections applies have been disposed "of by public auction or tender, the "price of issue of those securities

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stock and three other classes of securities of the company, but not those of the above-mentioned preference and debenture stocks.

By notice dated December 29, 1949, the applicant applied to the tribunal for the determination of the values of the preference and debenture stocks, and on November 11, 1950, the tribunal gave their decision in the form of a special case.

The preference and debenture stocks were not quoted in the Stock Exchange Official Daily List or Daily Supplementary List on any of the dates mentioned in sub-s. 2 which, therefore, did not provide for the determination of their compensation values; nor were those values determinable under sub-s. 3, 4, 5 or 6; and, accordingly, they were determinable under sub-s. 10. The amount of the preference stock was 82,275*l.*, of the 4 per cent. debenture stock 2,500*l.* and of the 4½ per cent. debenture stock 9,500*l.* The securities falling within the scope of s. 25, sub-s. 2, which, as respects all matters affecting their value, were " most " nearly comparable " with the preference stock, were the South Suburban Gas Company's and the Tottenham and District Gas Company's 5 per cent. preference stock; and with the 4 per cent. debenture stock, 4 per cent. debenture stocks of Bristol, Croydon, Tottenham and District, and Wandsworth Gas Companies. No 4½ per cent. perpetual debenture stock of a statutory gas company had been valued under s. 25, sub-s. 2.

Subject to the Court of Appeal's determining to the contrary, the tribunal decided that the real values for the purposes of s. 25

" shall for the purposes of this section " be deemed—(*a*) if the holder of the " securities is the person who originally " acquired them or his successor in " title other than a purchaser for " value, to be the price which he " originally paid for them: (*b*) in any " other case, to be the average gross " price obtained by the undertaker for " securities of that class so disposed " of ".

Sub-s. 9: " If any question arises " under any of the last seven preceding " subsections as to the value of any " securities, it shall be settled by " agreement between the Minister and " the stockholders' representative ap" pointed under the following provi" sions of this Part of this Act, or, in " default of such agreement, deter" mined by arbitration under this " Act ".

Sub-s. 10: " For the purposes of " this section, the value of any " securities, not being securities to " which subsection (2), (3), (4), (5) or " (6) of this section applies, shall be " such value as may be agreed between " the Minister and the . . . stock" holders' representative or, in default " of such agreement, as may be deter" mined by arbitration under this Act, " and the arbitration tribunal, in " determining the value of those " securities, shall have regard to all " relevant factors including, as far as " may be, the value of securities to " which subsection (2) of this section " applies (as determined under that " subsection), being securities which, " as respects all matters affecting their " value, are most nearly comparable to " the first-mentioned securities . . .".

were, per 100*l.* of stock:—in the case of the preference stock, 115*l.*, of the 4 per cent debenture stock, 102*l.* 15*s.*, and of the 4½ per cent. debenture stock, 113*l.* 10*s.* They decided that the value of securities within s. 25, sub-s. 10, must be decided primarily by reference to the value of "comparable securities" as determined by sub-s. 2 (which meant that the relevant date would be either in July, 1945, immediately before the general election, or in October, 1947, when the introduction of the Gas Act was announced in the King's speech) and not by reference to their values on May 1, 1949, the vesting date. The applicant contended that the value ought to have been decided by reference to their values at the vesting date; that, during the period from the middle of 1945 until the vesting date, the threat of nationalization consequent on the result of the general election depressed the prices of the comparable securities and the company's securities; that, but for that threat, those prices would have followed the substantial increase which occurred during that period in the prices of securities not threatened by nationalization; that that was a "relevant factor" within s. 25, sub-s. 10, to which the tribunal ought to have had regard; and that, accordingly, the values for compensation of securities to be valued under that sub-section were to be the values which those securities would have had on the vesting date but for the impending nationalization of the gas industry. The tribunal took the view that, even if they were wrong and the securities were to be valued as at the vesting date, the impending nationalization of the gas industry was not a factor which they were required to take into consideration in determining the values, since to do so would have added to the securities a hypothetical value which they did not really possess; nor did the tribunal consider that the agreement between the applicant and the Minister on the figure of 121*l.* per 100*l.* of stock as the compensation value of the company's ordinary stock could be regarded as a relevant factor.

The questions for the determination of the Court of Appeal were: (1.) whether the values for compensation under s. 25 were to be assessed on May 1, 1949; (2.) whether they were to be assessed on the basis that the gas industry was not about to be nationalized; (3.) whether the fact that the Minister had determined by agreement with the applicant under s. 25, sub-s. 10, a value for compensation of 121*l.* per cent. for the company's consolidated ordinary stock was a "relevant factor" within that sub-section.

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Mocatta, K.C., and *Templeman* for the applicant. The compensation values of the preference and debenture stocks, determinable, as they were, under s. 25, sub-s. 10, ought to have been assessed by reference to the values of the "comparable securities" at the vesting date. That would be indisputable if all that had to be considered was the actual wording of sub-s. 1. Sub-section 2 covers cases in which the securities were quoted on the Stock Exchange. The first six dates there mentioned were dates just before the nationalization of the gas industry was foreshadowed in the King's speech, and the last six were dates just before the result of the general election in 1945. The purpose of these provisions is, first, to determine the value of securities by reference to dates just before nationalization was actually coming, in 1947, or just before the coming into power of the government which was to accomplish it. Also, the stockholders could choose whichever of the two values proved to be the higher.

Sub-section 5 concerns the case of a new issue of a new class after October 20, 1947, the last of the days in the list just before nationalization was immediately pending. Their value for purposes of the section is to be deemed to be the issue price, and sub-ss. 3 and 4 are to apply to any fresh issue, or any conversion, of them.

By sub-s. 6 sub-ss. 2, 3 and 5 are not to apply to securities issued after 1945 "on terms and conditions approved by the "Minister" and to raise money for those purposes; there, also, the value of any such securities is to be deemed to be the price at which they were issued.

It is to be observed that the wording of sub-s. 5 is: ". . . "where a new class of securities has been issued at any time "after the 20th day of October . . .", and of sub-s. 6: "Sub-"sections 2, 3 and 5 of this section shall not apply to any securi-"ties issued at any time after the 31st day of December, 1945, ". . .". If, then, securities were issued without the Minister's consent in the intervening period, between December 31, 1945, and October 20, 1947, it would appear that neither sub-s. 5 nor sub-s. 6 would apply to them, so that no provision has been made for them at all.

When, in 1947, the King's speech showed that nationalization was coming, the value on the Stock Exchange of the kind of security that the court is now considering was sharply affected, and they fell from October, 1947, until the vesting date. At the same time, while the values of securities of gas undertakings were threatened in this manner, the values of securities of undertakings and companies not threatened by nationalization rose, the rising being, in the case of some industrial stocks, by as much as four to six points between 1947 and 1949. There is no reason why, had nationalization not been coming, the value of gas stocks, so far from falling, should not have risen just as much.

Certainly their values continually decreased, and, by May 1, 1949, were lower than they had been either after the general election or after the King's speech. The correct procedure, however, for the tribunal, in arriving at the compensation values, was to "have regard to" the impending nationalization as a "relevant factor" within the meaning of s. 25, sub-s. 10. They stated that to take into consideration the impending nationalization of the gas undertaking as a factor in determining the values of the securities would have added to the securities a hypothetical value which they did not in reality possess; but the methods which the Minister asked the tribunal to adopt, and which they did adopt, were themselves not directed in any greater degree to establishing the values which the securities "in reality" did possess, namely the values which they would have had on the vesting date but for the impending nationalization. That is just as "real" as deciding their values by reference to the values of the "comparable securities" as determined by s. 25, sub-s. 2. Already, under sub-s. 10, the applicant and the Minister had agreed that the compensation value of 100*l*. of ordinary stock should be 121*l*. That, again, is a "relevant factor", and the tribunal should have so regarded it; for it cannot be correct to give to the preference stock a compensation value not only not greater, but considerably less, than that of the preference stock.

Although sub-s. 10 provides that, in determining the value, the tribunal shall have regard to all relevant factors, including the value of securities "most nearly comparable" to which sub-s. 2 applies, it does not follow that the compensation values of securities not quoted on the dates given in sub-s. 2 are to be decided by reference to the values of the "comparable securities" as determined by sub-s. 2. The value to be taken is by reference to the vesting date, even though so to take it may have the result that the non-quoted securities escape the depression caused by the passing of the Act and the "comparable securities" do not escape it.

Also, there may well arise cases for which there is no provision and which may leave the tribunal at a loss how to proceed.

There is in existence at least one stock coming within sub-s. 10 on which the dividend is 10 per cent. There is, it appears, no other stock yielding so high a dividend, and the tribunal would be hard put to it to find a "comparable security".

The case stated shows that they took the view that twenty-nine dealings, covering 13,249*l.* of stock, were a "relevant "factor" in estimating the compensation value of the preference stock. In the case of only one dealing was there paid an amount greater than the 115*l.* per 100*l.* which was offered, namely, 120*l.* for each 100*l.* of 350*l.* of stock. In any event, the tribunal were not concerned with individual dealings. Their function was to fix a value, and prices paid for individual amounts of stock could not help them. It is not clear whether they considered that that particular example did help them or, indeed, whether they made any use of it at all; but it was not a "relevant factor" and they should not have considered it.

The Act is a dispossessing Act and is therefore to be construed in favour of the subject. Accordingly, the court is asked to answer all three questions in the affirmative and to allow the appeal.

Upjohn, K.C., and *Ashworth* (*R. J. Parker* with them) for the respondent, the Minister. The contention that the correct procedure for the tribunal, in arriving at the compensation values, was to "have regard to" the impending nationalization as a "relevant factor" is, as the tribunal themselves realized, misconceived. So to have done would have been to set on them a value entirely artificial or, as the tribunal put it, "hypothetical". Their real value was as found, by reference to the value of "comparable securities" as determined by sub-s. 2.

Also, the precise definition, or description, of "relevant "factor" is important. "Relevant" means "concerned with "the matter in hand", "in point", "pertinent"; and a "factor" is an "element in a result". That must be taken as including circumstances and facts which bear on, or are "con-"cerned with" or "pertinent" to, the compensation values of the securities. Clearly the fact that the Gas Act was about to be passed affected their values, depressing them considerably; and the Act itself does show that in certain circumstances (which would be "relevant factors") decreases in value which the passing of the Act had caused would have to be set off: see s. 26, sub-ss. 1 and 4, and s. 31, sub-s. 1, which latter provides that "there shall be paid by the Area Board in whom are vested ". . . property and rights of any ancillary gas undertaker or any

" undertaker . . . who is not a body corporate, by way of compensation . . . such amount as the gas undertaking of the " undertaker might have been expected to realize if—(*a*) it had " been sold as a going concern on the vesting date in the open " market by a willing seller to a willing buyer . . .; (*c*) as if " this Act had not been passed ". Also, s. 13, sub-s. 4, of the Coal Industry Nationalization Act, 1946, provides that the value of a " compensation unit " therein mentioned shall be " taken to be the amount which it might have been expected to " realize if this Act had not been passed . . .".

In the present case, however, it is s. 25, sub-s. 10, that has to be considered, and there is no provision there that the tribunal shall set off depreciation in values, or shall proceed " as though " the Act had not been passed ".

Even if the Gas Act, 1948, is a dispossessing Act, clearly the very method of valuation prescribed in s. 25, sub-s. 2, is far from being against the stockholder. That is not to say, however, that benevolent construction must go to the length of attributing to stocks a value which they do not possess, which the tribunal would have done had they taken into consideration the impending nationalization of the gas industry. What the stock would have been worth but for that impending nationalization is beside the point—quite apart from its being " hypothetical " in the strict sense that it could not have been said what they would have been worth in circumstances that did not exist. The truth is that the impending nationalization had depressed the values and that the depressed values were, at the time, the actual values. Thus, the tribunal took the proper course—namely, they decided that the value of these securities must be assessed primarily by reference to the value of the " comparable " securities " as determined by sub-s. 2. There is in sub-s. 10 not the word " primarily " but the expression " as far as may be ".

The tribunal acted properly. It cannot have been the intention of the legislature that the holders of " comparable securities " to which sub-s. 2 applies should not, and that the holders of non-quoted securities should, be compensated for the depressing effect of the impending nationalization.

The court should answer all three questions in the negative and dismiss the appeal.

EVERSHED, M.R. This is the first appeal of its kind by way of case stated, pursuant to ss. 63 and 64 of the Gas Act, 1948, by the Gas Arbitration Tribunal appointed to determine the values of certain securities for the purposes of s. 25 of the Act.

The securities in question are 5 per cent. consolidated preference stock, 4 per cent. perpetual debenture stock, and 4½ per cent. perpetual debenture stock of the formerly existing Dudley, Brierley Hill and District Gas Company. The amount of the stocks respectively (starting with the preference stock) is 82,275*l.*, 2,500*l.* and 9,500*l.*

The purpose of the Gas Act, 1948, was (I quote from the preamble to the Act), " to provide for the establishment of Area " Gas Boards and a Gas Council, and for the exercise and performance by those boards and that council of functions relating " to the supply of gas and coke and certain other matters; for " the transfer to such boards as aforesaid and to the said council " of property, rights, obligations and liabilities of gas undertakers " and other persons; for co-ordinating the activities of Area Gas " Boards and the National Coal Board relating to carbonisation; " to amend the law relating to the supply of gas; to make certain " consequential provision as to income tax; and for the purposes " connected with the matters aforesaid ".

Putting it in more brief and popular language, the object of the Act was to nationalize the gas industry in England, Wales and Scotland. For that purpose provision was made, among other things, for the acquisition of the various gas undertakings, of which the Dudley, Brierley Hill and District Gas Company was one. That particular company falls within the description contained in s. 15, sub-s. 1 (*a*), of the Act, defined in sub-s. 2 (*a*) as a " statutory undertaker ", that is, a person who carries on a gas undertaking authorized by any enactment.

As I have referred to s. 15, it may be of assistance to a later part of this judgment if I state that sub-s. 1 (*b*) refers to a person carrying on " a gas undertaking not authorized by any enactment " but providing supplies of gas the whole or main part of which " was, during the year 1947, consumed by persons other than " the undertaker, any subsidiary or holding company of the " undertaker, and any subsidiary of a holding company of the " undertaker . . .". Such a person as I have just described is referred to as a " non-statutory undertaker " in sub-s. 2 (*b*). There are other types of gas undertakers, including an ancillary gas undertaker, where the person concerned is also comprised within sub-s. 2 (*b*), but where the gas is not the whole or main part of his business. I think that that is sufficient, for present purposes, to describe the type of person, corporation or company whose undertakings are so acquired.

For the purposes of the acquisition process, a vesting date was referred to in the Act, which has subsequently been fixed as May 1, 1949.

The essential section involved in this appeal is s. 25. Under the scheme and provisions of the Act, the undertaking of the particular statutory undertaker with which we are concerned vested on the vesting date in the West Midlands Area Board.

The problem concerns the ascertainment of the amount of compensation which was to be payable in respect of the various stocks of this particular undertaker. In addition to the preference and debenture stocks, there was also an issue of ordinary stock, which fact will have a significance to be presently noticed.

I must read a substantial part, but not, I hope, all, of s. 25. Sub-s. 1 is concerned with the amount of British gas stock (the new stock created for the purpose), which is to be issued to the holders of the stocks of the company, the statutory undertaker or other company, the assets of which were acquired. [His Lordship read s. 25, sub-s. 1, and continued:] That sub-section admittedly provides that, whatever be the value of the securities held by the holder, and however that value be ascertained, he will receive, by way of compensation, not a sum of cash but an amount of British gas stock which will be of the value equivalent to the value of the stocks of the holder on May 1, 1949. That date relates to the value of the British Gas Council's stock when transferred.

As the inferences which arise from this sub-section are fundamental to Mr. Mocatta's argument for the stockholder, I venture to take a few more moments of time in explaining what I have just said by an illustration. Let it be supposed that the value of the securities held by a particular holder is ascertained, in accordance with the other applicable provisions, to be 98*l*. The amount of gas stock which that holder is entitled to receive is such an amount of British gas stock as on May 1, 1949, shall be worth 98*l*. If the value of British gas stock is 98*l*., for every 100*l*. on that date he will therefore receive 100*l*. nominal of British gas stock. It will be observed from what I have said that the question at what, if any, particular date the securities to be compensated are valued has not been stated. Mr. Mocatta has said that if the matter stood merely in accordance with the provisions of sub-s. 1, it would follow as a matter of ordinary sense that that value would also be ascertained at the same date, being the date

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when the transaction of transfer is to take place. Were there nothing more relevant to the question than is found in that subsection, the answer which Mr. Mocatta suggests might well be correct. But the remainder of the first ten sub-sections of s. 25 deal with the actual way of arriving at the first figure which I mentioned in my illustration, namely, the value of the securities of the particular holder. Sub-s. 2 deals with the case where those securities, of whatever class, were quoted in the ordinary way on the Stock Exchange. [His Lordship read sub-s. 2 and continued:] Quite plainly, the effect of those provisions in the case of what I have called the " quoted securities " is two-fold. First, the value is clearly to be arrived at by looking at dates on which, it may be said, the securities were unaffected either by the immediate prospect of nationalization—that is, in 1947—or by the more distant picture of nationalization—that is, in 1945. The reason for taking those dates is clearly that, as a result of the pending nationalization, there was an effect, perceptible on the Stock Exchange, on the value of these types of security. In fact, they fell during the period from October, 1947, until the vesting date, whereas other industrial securities during the same period rose. That phenomenon is described, no doubt accurately, by Mr. Mocatta as being " the depressing effect " of the proposed gas nationalization. From that particular depression, therefore, this method of arriving at the value was designed to protect the stockholders. The second effect of it was to give an option to the stockholders to take whichever was the better of the two figures, one determined by reference to 1947 figures and the other determined by reference to 1945 figures. So much for the provisions for quoted securities.

Sub-s. 3 deals with a special class of case, namely, the case of securities falling within sub-s. 2, but where there has been a fresh issue of securities of the particular class after the last relevant quotation. Then the value is to be deemed " to be the " average of the values of all the securities of that class calcu- " lated on the basis that (*a*) the value of each of the securities " comprised in that issue is the price at which it was issued, and " (*b*) the value of the remaining securities is the value which " those securities had or would have had for the purposes of this " section immediately before the issue took place ". The effect of that is to fix the price of these new issues by reference to a calculation which, so far as the old part of the issues was concerned, is to be determined in accordance with these " pre- " depression " dates of quotation.

Sub-s. 4 deals with cases where the stocks have been converted into securities of " a different nominal value ". I may be forgiven, I hope, if I do not read it and if I say no more about it than that it adheres to the main plan which is discernible in what I have read, namely, the fixing of the value of these securities by reference to what I have called the " pre-depression " dates. Perhaps I should say more accurately (because it was not then known what the ultimate effect would be) that the value was fixed by reference to dates prior to the date when the pendency of the Gas Act would be likely to affect the value one way or the other. [His Lordship referred to sub-ss. 5, 6, 7 and 8, read sub-s. 9, and continued:] Before I pass to the next section I will observe that Mr. Mocatta stated that the catena of subsections which I have read has this possible hiatus in it, that securities issued after December 31, 1945, without the consent of the Minister but before October 20, 1947, would be covered neither by sub-s. 5 nor by sub-s. 6. His reason for making that point will appear shortly.

So far, the provisions of the section have dealt exclusively with what I have called " quoted securities ". Sub-s. 10, with which this case is concerned, deals with securities other than quoted securities. [His Lordship read sub-s. 10 and continued:] It is under that sub-section that the various securities, including the ordinary stock, of the Dudley Company fell to be ascertained. So far as the ordinary stock is concerned, agreement was reached between the Minister and the stockholders' representative, and the figure upon which they agreed was 121*l.* per cent.; but with regard to the other three types of stock no agreement was found possible and the matter accordingly came before the arbitration tribunal.

The special case which the tribunal stated raised for the opinion of the court three questions. It is right that I should say at once—because I do not propose to read all the figures—that no question arises, if any of the methods of calculation for which Mr. Mocatta has contended be the correct ones, of impossibility of arriving at the resultant figure, because in each case the tribunal did arrive at a figure which would be appropriate on the various hypotheses stated. But, subject to this court's determining to the contrary, the tribunal decided that the real values for the three classes of stock which I have mentioned were, per 100*l.* of stock, 115*l.* in the case of the preference stock, 102*l.* 15*s.* 0*d.* in the case of the 4 per cent. debenture stock, and 113*l.* 10*s.* 0*d.* in the case of the 4½ per cent. debenture stock.

The case which they state very clearly sets out the rival contentions; it states the matters which they took into account; and, finally, poses the questions to which the arguments gave rise.

Putting it quite briefly, the method which they adopted was this. They found as a fact that in each of the three cases there were certain stocks which fall within the description of securities " most nearly comparable " to the particular security in question, and they took the figure that would be appropriate for those comparable stocks in accordance with the provisions of sub-s. 2 as their guide; but in all the circumstances of the case they appear to have made some slight addition to the values at which they thus arrived. There was no stock which the tribunal thought " most nearly comparable " to the 4½ per cent. debenture stock of this company other than the company's own 4 per cent. stock, and therefore the figure at which they arrived in respect of the 4½ per cent. stock was in a sense arrived at at one remove by proceeding from their conclusion on the 4 per cent. stock to their conclusion on the 4½ per cent. stock. Mr. Mocatta has made no special point about that stock so that my more general statement may be taken as accurate.

It follows that the basis of their valuation in each case was a figure arrived at in relation, not to the vesting date, but to the earlier 1947 or 1945 dates, and they rejected the argument on behalf of the stockholder that in the case of non-quoted securities —that is, a case falling under sub-s. 10—the right date on which to arrive at a value was the vesting date. I have already stated that between 1947 and the vesting date stocks of this character declined, whereas other industrial stocks generally rose, the rise being capable of expression by saying that there was a four to six point rise in those stocks. From this it may be assumed (or so it is said) that, had it not been for the shadow of this impending legislation, gas stocks would also have risen from four to six points between 1947 and 1949.

In approaching this problem it has been sought to base argument on the use made in the case stated of the adjectives " real " and " artificial ". Mr. Mocatta has been accused of applying an artificial value as distinct from a real one. He has rejoined that the adjective " real " has no better applicability to the method of the Minister of Fuel and Power than his own method. I wish to avoid in this matter the bandying of words, and I shall try to avoid using the words " real " and " artificial ", or at all events suggesting that those words, as words, have any particular importance in the determination of the question in issue. From what I have said, however, it will be clear that, if the value of these securities is to be ascertained by reference, not to some 1947 or 1945 figure, but to a figure at the vesting date, Mr. Mocatta is faced with a serious difficulty, in that the value in fact went on declining, and the price of gas stocks on May 1, 1949, was lower than it was in 1945 or 1947. In order to avoid that (for him) unsatisfactory result, Mr. Mocatta has claimed that according to the true reading of sub-s. 10 the tribunal, in making its valuation, must exclude any effects that the Gas Act had upon these later securities. It is because of that submission that he has been accused of using an " artificial " value.

I pass to the precise questions which the tribunal formulated. They are three in number, but, for the reasons which I have just stated, numbers one and two must be taken together. The three questions are these. [His Lordship read the questions and continued:] I propose to deal with those questions in reverse order. First, with regard to whether the agreement between the applicant and the Minister of 121*l.* for the ordinary stock is a relevant factor in considering particularly the value of the preference stock, the tribunal stated that they regarded it as irrelevant, and, in my judgment, they were right so to do. They stated: " No evidence " was given to us showing how the figure of 121*l.* was arrived at " or the circumstances in which the agreement was made or the " considerations which prompted it ". They go on to state one fact which was before them, namely, that the ordinary stock during the last sixty-eight years paid regularly a dividend at 5 per cent., namely, the same dividend as the preference stock was entitled to receive; and it further appears that by statute they were unable to receive a higher figure.

Mr. Mocatta has said that it is obviously absurd that, if the ordinary stock (which can be treated for this purpose as a fixed 5 per cent. stock) is valued at 121*l.*, the 5 per cent. preference stock which had priority over the ordinary stock should be of a value not greater but less by the difference between 121*l.* per cent. and 115*l.* per cent. He says that shows there must be something wrong with the method of calculation. I am not for a moment suggesting that, in arriving at the figure of 121*l.* per cent. for ordinary stock, the Minister was so persuaded by the applicant's arguments or blandishments that he did not properly apply the provisions of sub-s. 10, or was otherwise extravagant in his agreement of the price. I assume that it was arrived at by a proper application of the principles to be applied. As the special case states, however, no evidence was given how it was arrived at or of the circumstances or the considerations relevant to it. For all we know, or the tribunal knew, there may have been special circumstances which attached this particular price quite properly to the ordinary stock. Unless all the facts were known which bear upon the arriving at the 121*l.* per cent. per 100*l.* of stock, it must be, in my judgment, right to say that it is not a relevant factor, and indeed it would be liable to be a most misleading factor if it were taken into account. I am unable to accept the view that, because of the one circumstance limiting the dividend on the ordinary stock which I have already stated, that must be necessarily reflected in the price of the preference stock. Mr. Mocatta I hope will forgive me if I say no more about it than that. For the reasons which they themselves state, the tribunal were plainly right in regarding as irrelevant the fact that this price had been agreed between the Minister and the stockholders' representative.

I now come to the more difficult problem of the first two questions. I have stated that I will deal with them in reverse order, not only because unless Mr. Mocatta succeeds on his second point the first is worse than useless to him, but because I think that the consideration of the second point assists in arriving at the proper conclusion of the meaning of sub-s. 10 not only in relation to this point but in relation to the first point. I have said that I would try to avoid using the word " artificial ", and I will do so now. But I must say that I approach the construction of this sub-section as a matter of English with the view that a reference to " relevant factors " is a reference to facts as they are, or circumstances as they are, which may have a bearing on the problem to be solved. Accordingly, the question what the price of stocks of this kind would have been had the Gas Act not been passed seems to me prima facie not a relevant factor in accordance with the ordinary use of that term. By " relevant factors ", as Mr. Upjohn pointed out, are meant the factors, circumstances and other facts which have a bearing on the problem. No doubt, the pendency of the passing of the Gas Act was a factor which would have a bearing on the values, and in so far as it did it reduced their value. If it was intended to exclude from consideration some matter of fact which was there, and which plainly did affect the subject-matter under consideration, I should most certainly expect Parliament deliberately and expressly so to have provided, as, indeed, it is known it frequently does. Examples were given to us by Mr. Upjohn by reference to other legislation: for example, under the Coal Industry

Nationalization Act, 1945, where the formula was that, in arriving at particular values, the person or body charged with the calculation was to proceed as "if this Act had not been passed". That is a common formula in legislation. Indeed (and this seems to me of great significance), it is to be found in this very Act, where it is appropriate. In s. 31, for example, provision is made for "compensation to ancillary gas undertakers" and others, those being persons the definition of whom I have already stated. In the case of ancillary gas undertakings, not being bodies corporate, provision is made that compensation is to be arrived at by valuing the undertaking and seeing what it would have been expected to realize if it had been sold on the vesting date in the open market by a willing seller to a willing buyer. The hypothesis of a willing seller or a willing buyer is in conflict, of course, with the actual facts of the case, because, so far from there being a willing sale, the effect of the Gas Act was to acquire the undertaking compulsorily. Therefore, in this section, dealing with the valuation of this type of asset, the formula which I have mentioned is used, the words being "there shall be paid by . . . way of compensation ". . . such amount as the gas undertaking of the undertaker "might have been expected to realize if . . . (c) this Act had not "been passed".

Another instance of the same type of provision is in s. 26. That provides for the case of gas undertakings which have suffered various kinds of war damage, so that the value of their securities may fairly be said to have been affected adversely by the war damage which they have suffered. In such a case provision is made for compensating the holder by offsetting the depreciation due or attributable to the war damage. The formula there used, at the end of sub-s. 1, is: "The Minister shall direct that the "values of those securities for the purposes of the last preceding "section"—that is s. 25—"shall be increased by such amount "as may be agreed between him and the stockholders' represen-"tative to be necessary to offset the said depreciation" in the securities. The same conception is found also in s. 26, sub-s. 4.

It is therefore clear that the framers of this Act had in mind that, in certain circumstances, it would be necessary to make provision in order that the depreciation in the values due to war damage, or, in certain circumstances, to the pendency of passing of the Act, would have to be offset; but in sub-s. 10 there is no hint of any such notion as a relevant factor to be taken into account by the tribunal in arriving at the value of the securities concerned. Therefore, if this were the only point, I would feel compelled to say that there is no basis, in the language of sub-s. 10, for saying that there was to be any such offsetting operation in arriving at the value of the securities with which we are concerned.

The matter has been argued also on the question at what date these values should be taken. I think the question " at what " date " is really an irrelevant one. The tribunal are arriving at the value by a particular process. They are not called on, so far as I understand and interpret the language, to do that at any particular or specific date. The question being, how much is 100*l.* nominal of the Dudley Company's preference stock to be treated as worth for the purposes of the acquisition of the undertaking, the tribunal are told how to arrive at the figure. They are told that they are to have regard to all the relevant factors; and then come the very important words " including, as far as " may be, the value of the securities to which subsection (2) of " this section applies (as determined under that subsection), being " securities which, as respects all matters affecting their value, " are most nearly comparable to the first-mentioned securities " . . .". Something has been said about the precise significance to be given to the words " as far as may be ". I find it unnecessary to say whether their effect is equivalent to " primarily ". It is sufficient to say that one of the relevant factors, and the only one in point of fact specified, is the value of what are called, in short, " comparable securities ". That is an abbreviation which, I think, does less than justice to the point. It is not supposed that there will necessarily be found securities which are strictly comparable, that is to say, really similar. What has to be done is to find what securities there are among the quoted stocks which are " most nearly comparable " to see what the value of those securities is, determined under the sub-section, that is, determined by reference to the dates and the methods specified in sub-s. 2. It seems to me, as a matter of English, plain enough that if the price of the quoted securities most nearly comparable, valued in the way specified in sub-s. 2, is a relevant circumstance, that negatives the notion that, in the case of unquoted securities, the tribunal are starting, from that terminus, to arrive at a value on the vesting date in May, 1949. It appears to me that that would have been a most circumlocutory, almost a deceptive way, to arrive at the conclusion, if that were Parliament's intention.

This also is a matter of great significance. It is, I think, proper to approach a problem of this kind by assuming that the persons who are to receive compensation will be compensated broadly on the same basis whether their securities happen to have been, or happen not to have been, quoted on all the relevant dates. It would be, I think, a capricious and unjust result if the holder of securities in the Dudley Company, which happened not to have been quoted securities, were to receive compensation for the depressing effect of the pending gas nationalization, but the holder of some other stocks, such as the Bristol or Tottenham Companies (for they were looked on by the tribunal as comparable) were not to receive any such compensation, particularly where the difference was, as has been shown to be the case here, as much as four to six points.

I do not wish it to be thought that I am interpreting the minds of the legislators in 1948 by reference to something which happened afterwards, and which nobody could then have known would happen. I take it that it was regarded as exceedingly probable that the effect of the pending legislation would be to depress these stocks. But, whether it depressed or elevated them, the point is the same, namely, that it would be surprising if some treatment were meted out to a holder of stocks which were not quoted different from that given to a holder of stocks which were quoted. Mr. Mocatta has sought, at any rate in part, to meet that argument by contending that s. 25, sub-s. 10, on the basis of the interpretation which he has tried to state, is not universal; that there may be stocks of an undertaker company of a non-quoted variety with regard to which no other stocks, falling within the description "most nearly comparable" could be found. I have already referred to one instance which Mr. Mocatta's ingenuity extracted from a comparison of the terms of sub-ss. 5 and 6. He gave also as an instance 10 per cent. ordinary stock, that is, a stock in respect of which the particular enactment permitted a payment of 10 per cent. dividend. He told us that that was something so unusual that he could not find any other stock like it, yet it did exist. I will assume in Mr. Mocatta's favour (though I must not be taken as necessarily accepting it) that there may be cases in which the particular stock is so much sui generis that the tribunal, when seeking for the most nearly comparable stock, would give up the pursuit as hopeless and say that there was nothing that is in the least comparable. What method they would in such circumstances adopt we are, perhaps fortunately, not called on to decide, but in fairness to Mr. Mocatta's argument, I could not pass it over entirely in silence. I ventured to suggest in the course of argument that any such stocks might be so unlike anything liable to be affected by market symptoms that the question of difference in value between 1945 and 1949 might be purely academic. It may be that a case would, or might, arise, in which the tribunal would have to arrive, by a proper application of the language of the sub-section, at a figure which was not, so to speak, tied to the 1945 or 1947 figures. I think that it would be an unusual case; so unusual that, for myself, I think that it could not be treated as constituting any discrimination between that type of stockholder and stockholders of the more usual type. But, assuming all that I have said in Mr. Mocatta's favour, I still find the language of sub-s. 10 too compelling to enable me to say that it must be so construed as necessarily to require the court in all cases to arrive by a very tortuous and steep climb at May 1, 1949, as the date to which the valuation relates; the more particularly since, in the course of this ascent, it would be necessary to take the last few steps with one eye closed, so as to exclude from consideration the most obvious feature which the view would present, namely, the passing of the Gas Act, 1948. I think that, certainly for the ordinary case, or what seems to me clearly was regarded in the contemplation of the draftsman of this sub-section as the ordinary case, the route adopted by the Gas Arbitration Tribunal was the correct method, the method laid down by Parliament. I would, therefore, answer questions one and two, as I have answered question three, in the negative: I think that the Gas Arbitration Tribunal rightly arrived at their result.

I am loath to take up more time in discussing this matter, but I realize that it is important, and I desire to do justice to the arguments. But I think that it would be very dangerous and wrong if this court now attempted to make a complete and exhaustive category of the particular factors which, in any given case, the Gas Arbitration Tribunal ought to take into account. It is plain that the discovery of the most nearly comparable stock or securities may well require other matters to be taken into account. Though the securities chosen may be the most nearly comparable, there may be circumstances which in truth distinguish them in certain respects, circumstances relating, for example, to the modernity or antiquity of the plant owned and the area supplied and matters of that kind, which would cause the tribunal to qualify by addition or subtraction the figure which they first derive from the most nearly comparable stock. All that, the tribunal here seems to me to have done. They have considered all those matters as appears from their own statement of the case.

I conclude with a reference to one particular matter, to which some argument was directed. In para. I (m) on p. 8 of the case stated the tribunal state: "We have been supplied with a list of "the dealings in the Dudley 5 per cent. Consolidated Preference "Stock for the years 1937–1949. The list showed that during "that period there were fifty-two separate transfers, covering in "all 19,023*l*. of stock. Of those transfers, twenty-nine took place "after July 26, 1945, and these covered in all 13,249*l*. of stock. "We agree that those dealings are a relevant factor in estimating "the value for compensation of the said preference stock. After "scrutiny of this list we find that there is only one dealing, "namely, a small parcel of 350*l*. of stock for which 120*l*. for 100*l*. "of stock was paid on April 28, 1947, that exceeds the amount "of 115*l*. offered by the Minister". The questions were raised whether it was legitimate, and, if so, how, to have regard to particular dealings, and, especially, to the one referred to as occurring on April 28, 1947, where the price paid was 120*l*., and if it was legitimate, whether the tribunal had drawn the proper, or, indeed, any conclusion from it. In my judgment, that paragraph is free from criticism. I think that what the tribunal were saying was that they had found the figure of 115*l*. to be the right figure for the preference stock, based on the securities most nearly comparable, after consideration of other relevant factors, and some very slight adjustment as a consequence—they had looked through those dealings to see whether the prices actually paid indicated that there was anything wrong with the figure at which they had thus arrived, and that they thought that there was not, because they found that, with one exception, the actual prices paid were not above, but were the same as or below, the figure which they had taken. The one particular instance that they had mentioned was of so small an amount that it might be disregarded as not having any real bearing on the point. That is how I construe sub-para. (*m*). I think that it was correct for them to consider these transactions as a check, and I think that the conclusion that they drew from that examination, although negative, was correct.

For the reasons which I have stated the questions for the determination of this court should all, in my judgment, be answered in the negative. Accordingly, the appeal fails.

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and Power.

Jenkins, L.J. I agree. I find it impossible to dissent from the passage on p. 5 of the stated case in which the tribunal answer the relevant question of construction in these terms: "Subject to the opinion of the Court of Appeal we find and "decide that on the true construction of sub-s. 10 of s. 25 of the "Act, the values of securities within that sub-section (and in "particular the values of the Dudley securities) must be assessed "primarily by reference to the values of the comparable "securities as determined by sub-s. 2 of s. 25 and not by reference to their values on May 1, 1949. The words 'shall have "'regard to all relevant factors' in sub-s. 10 do, however, require "us to take into account other factors if we are satisfied that they "are relevant". Once this construction of sub-s. 10 is accepted it necessarily follows that the first and second questions raised by the case must be answered in the negative. The contention that May 1, 1949, should be taken as the date of valuation is expressly rejected; and the contention that allowance should be made for the depressing effect of impending nationalization must also fail, because the basis of valuation prescribed by sub-s. 10 relates the matter back to a period before the depressing effect of nationalization had made itself felt, that is to say, the date or dates in 1945 by reference to which the values of the comparable securities were fixed.

Further, I entirely agree with the view expressed by the tribunal that, even if the effect of impending nationalization had not been excluded by the date to which the sub-s. 10 valuation is related, it could not have been a relevant factor to be taken into account for this purpose. As my Lord has said, the hypothesis that the Gas Act had not been passed and that there was not going to be any nationalization is not a "factor" in any ordinary sense of the word. I agree that there is no justification whatever, on the language of the section, for importing into the calculation the hypothetical assumption suggested.

With regard to the agreement reached as to the value of the ordinary shares, I entirely agree that on the evidence before the tribunal it could not be regarded as a relevant factor.

Accordingly, I agree with the result stated by my Lord.

Birkett, L.J. I agree most fully with the two judgments which have just been delivered. The three points which were raised by this appeal, and which were so clearly stated and argued by Mr. Mocatta, have been dealt with so fully and so completely in the judgments already delivered that it is no mere conventional use of a customary phrase when I say that I really have nothing useful to add.

Appeal dismissed.

Solicitors: *Linklaters & Paines; Treasury Solicitor.*

K. R. A. H.

COCKRAM *v.* TROPICAL PRESERVATION CO. LD.

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Evershed, M.R., Jenkins and Birkett, L.JJ.

Rating—De-rating—"Industrial hereditament"—Premises used for packing articles for export—Special process enabling packed articles to withstand tropical climate in storage—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-s.* 1—*Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-s.* 1.

Section 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, defines an "industrial hereditament" by reference to the definition in s. 149, sub-s. 1, of the Factory and Workshop Act, 1901, by virtue of which sub-section premises are an industrial hereditament if on them is carried out any operation "incidental to "any of the following purposes, namely, (i) the making of any "article . . . (ii) the altering, repairing . . . or finishing of any "article, or (iii) the adapting for sale of any article".

A limited company carried on on premises occupied by them a special form of packing, which they called "packaging", the effect of which was to make it possible for the articles packed—spare parts for motor vehicles, which spare parts were manufactured by others and sent to the company for "packaging"—to be stored for protracted periods in adverse climatic conditions at their export destinations. The articles when delivered to the company were fit for use in this country, but were not in a fit condition for export and storage abroad. The special processes applied in the packing protected the spare parts against damage by excess humidity and extremes of temperature and other hazards of storage, and included processes such as applying temporary protective dressings and placing the articles in waterproof containers or wrappings.

Held, that the premises were an industrial hereditament within the definition in s. 149, sub-s. 1, of the Act of 1901, because the operations of the company had the effect of converting into something slightly different the articles sent to them for special packing, since they could be regarded either as having been given additional qualities without the addition of which they would not have answered the requirements of their ultimate purchasers or as being converted from what they were into specially packed articles: they were not packed merely for safe arrival and use immediately thereafter, but

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also for storage and preservation for a considerable time after arrival at their destination.

Sedgwick v. *Watney, Combe, Reid & Co. Ld.* [1931] A. C. 446 considered.

CASE STATED by the Lands Tribunal for the decision of the Court of Appeal under s. 3, sub-s. 4, of the Lands Tribunal Act, 1949, and R. S. C., Order LVIIIB.

The appellant was D. J. Cockram, the Valuation Officer for the Northampton Valuation Area, against a decision of a local valuation court for the Administrative County of Northampton and the County Borough of Northampton joint local valuation panel area, given at Northampton on May 23, 1950, in respect of a hereditament occupied by Tropical Preservation Co. Ld., the respondents, and entered in Pt. I of the valuation list for the Brackley rural district and therein described as "Warehouse and "premises, Main Site, Chipping Warden R.A.F. Station, Chipping Warden, Banbury", with a gross value of 340*l.* and a rateable value of 280*l.*

On March 10, 1950, the company made a proposal that the hereditament ought to be treated as an industrial hereditament, it being used for "reclamation, preservation and packaging of "service spares for the Ministry of Supply, Air Ministry and "Admiralty and export packing". On March 11, 1950, the valuation officer objected to the proposal on the ground "that "the hereditament is not occupied and used as an industrial "hereditament within the meaning of the Rating and Valuation "(Apportionment) Act, 1928, and that no alteration should be "made in the valuation list in pursuance of the proposal".

On April 25, 1950, the company gave notice of appeal to the local valuation court against the objection, on the following grounds: that "the premises are used for a manufacturing "process, in so far as all the goods sent to us for preservation "and pre-packing are in an unfinished state. Before the goods "handled by us can be accepted by the various service departments concerned, they must receive preservation treatments "which will ensure that they will not only arrive at their destinations in various parts of the world in a usable condition, but "also that the preservation we apply shall provide a permanent "protection against corrosion under the conditions in which they "are to be used in the various theatres to which they are sent. "Our various processes are as akin to manufacturing as, say, any "plating process".

On May 23, 1950, the local valuation court decided to allow the appeal and to direct the transfer of the hereditament to Pt. II of the valuation list as an industrial hereditament, the assessment figures to be agreed between the parties. On June 10, 1950, the valuation officer gave notice of appeal against the decision to the Lands Tribunal, on the ground " that the hereditament is not " occupied and used as an industrial hereditament within the " meaning of " the Act of 1928. The company gave notice of intention to appear as respondents to the appeal to the Lands Tribunal on the ground that " the hereditament is occupied and " used as an industrial hereditament within the meaning of the " Rating and Valuation (Apportionment) Act, 1928 ".

The parties agreed at the hearing before the tribunal that, if the appeal should succeed, the hereditament should remain in Pt. I of the valuation list at the existing figures, whereas, if the appeal should fail, it should be transferred to Pt. II of the valuation list at a net annual value of 280*l*., apportioned as to industrial purposes 267*l*. and non-industrial purposes 13*l*., with a rateable value of 80*l*., made up of 67*l*. for industrial purposes and 13*l*. for non-industrial purposes.

The tribunal found the following facts proved:—The hereditament is situated at Chipping Warden R.A.F. Station, about four miles from Banbury. It consists of seven blocks of buildings of light construction, built on concrete foundations in 4½ inch brickwork with corrugated asbestos roofs and identified by Air Ministry numbering.

The company carry out at the hereditament " packaging ", including ancillary treatment, of spare parts for motor vehicles manufactured elsewhere and destined for government departments. They do this in about equal proportions for government departments and for manufacturers who are under contract to deliver " packaged " articles to those departments. The " packaging " done is elaborate and far more complicated than ordinary commercial packing, and in all cases is carried out as prescribed by department specifications. It includes cleaning, drying, preserving, identifying and packing in compliance with the specification and contract terms governing the work; and non-compliance with specification renders the work or any part of it liable to rejection at any stage.

Three basic methods of full-standard " packaging ", known as I, IA and II, are in use by the company at the hereditament. Method I is a method of " packaging " in which deterioration of articles is prevented by the application to them of a temporary protective dressing, but no action is taken to prevent ingress of water or water-vapour to the package. It is used for, inter alia, white metal bearings, which are treated with mineral jelly, then wrapped in grease-resisting paper and packed in a carton with corrugated cardboard, a detailed description of the bearings being affixed to the outside.

Method Ia is a method of " packaging " in which deterioration of articles is prevented by the application to them of a temporary protective dressing, and in which the wrapping or container renders the package waterproof. It is used for, inter alia, ball-bearing sets which are heavily greased, wrapped in grease-proof paper with an identifying description, then placed in an outer cover moulded from waxed fabric and carrying a description label, the whole then being dipped into heated wax to ensure that it is impervious.

Method II is a method of " packaging " in which the wrapping or container renders the package waterproof, and provides a water-vapour barrier. It is used for, inter alia, electrical equipment where the article itself cannot efficiently be treated for preservation. The article being " packaged " is wrapped in waxed paper and put with corrugated cardboard into a waxed fabric carton in which is also placed a bag of material termed a " dessicant ", the purpose of which is to absorb any moisture which might reside in or penetrate the package. Method II also includes another type of " packaging ", which is done in suitable atmospheric conditions, and is used for fully-charged, ready-to-use cells for alkali batteries. The cells are provided with rubber cushioning, and put into a plastic covering closed and welded by machinery. Twelve cells are put into a large carton, which is then put with others into a packing-case suitable for transit.

Various materials are purchased and used by the company in carrying out the operations above described, including cardboard blanks which are stitched into cartons on the hereditament, wax, resin and oils and chemicals for cleaning articles. Packing-cases are brought in already made. Electrical power is used on the hereditament, and there are two welding machines for closing plastic containers, and a converter for dehydrating dessicants before use. About 150 people are employed at the hereditament, of whom about 100 are engaged in the preservation processes and packing, the rest being for supervision, stores, general labour and administration.

Articles for " packaging " delivered to the company by the manufacturers are already fit for sale and for use in this country, and those delivered to the company by government departments are already fit for use here, but they are not in a fit condition for the export purposes for which they are required.

The object of the work done at the hereditament is to make the articles fit for those export purposes by ensuring that the contents of the packages will be in a satisfactory condition when required in the future for use abroad, if necessary in abnormal climatic conditions, and to that end to protect the articles by treatment and packaging against damage by excess humidity, extremes of temperature, and other hazards of transport and storage.

The questions which the tribunal asked themselves were:—(1.) Can the operations carried out by the company at the hereditament properly be regarded as being in, or incidental to, the making of any article or of part of any article, the altering, repairing, ornamenting or finishing of any article, or the adapting for sale of any article, within the meaning of s. 149, sub-s. 1, of the Factory and Workshop Act, 1901, so as to confer upon the hereditament the status of a factory or workshop? And (2.) whether the hereditament, if a factory or workshop, is excluded from the description of "industrial hereditament" as defined by s. 3, sub-s. 1, of the Act of 1928, by being primarily occupied and used for any of the purposes mentioned in paras. (*a*) to (*e*) of the proviso to that sub-section, or any combination of such purposes, or for any other purposes which are not those of a factory or workshop? For the reasons given in a written decision dated March 1, 1951, the tribunal answered the former question in the affirmative, and the latter question in the negative.

Accordingly, they ordered that the appeal should be dismissed, and that the hereditament should be inserted in Pt. II of the valuation list at the figures agreed between the parties.

The question for the Court of Appeal was whether the tribunal came to a correct determination in point of law in holding that the hereditament was an "industrial hereditament" as defined by s. 3, sub-s. 1, of the Act of 1928.

Erskine Simes, K.C., and *Patrick Browne* for the valuation officer. The question is whether this hereditament is an industrial hereditament within s. 3, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928 (1), on the general ground that the

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(1) The Factory and Workshop Act, 1901, s. 149, sub-s. 1, defines "workshop" as including any premises used by way of trade for "the adapting for sale of any "article".

The Rating and Valuation (Apportionment) Act, 1928, provides by s. 3, premises are used "for the adapting for sale of any article". These premises are used for packing only. That is not an adaptation for sale. The articles are not altered by being packed, as is the case where chocolates are packed in ornamented boxes: see *Fullers Ld.* v. *Squire* (2). Bottling is an example of turning an unfinished article into a finished article: *Sedgwick* v. *Watney, Combe, Reid & Co. Ld.* (3). [They also referred to *Moon* v. *London County Council* (4); *Union Cold Storage Co. Ld.* v. *Bancroft* (5); *A. Richardson & Son* v. *Middlesbrough Borough Assessment Committee* (6); *Acton Borough Council* v. *West Middlesex Assessment Committee* (7).]

Ramsay Willis for the company. It is submitted that what was done to these spare parts amounted to an industrial process. The decision in the *Union Cold Storage* case (8) is distinguishable, since what was done to the meat there was to enable it to be stored. The nearest case to the present is *A. Richardson & Son* v. *Middlesbrough Borough Assessment Committee* (9). These spare parts are not ready for distribution until they have been packed in a particular way. What is sold here is an article packed in a particular way. If it were not so packed, it would not be what the customer had purchased. *Wiltshire County Valuation Committee* v. *London Co-operative Society Ld.* (10) was a different case. There the premises were used for cooling milk, which was held not to be adapting an article for sale. The facts of this case are distinguishable from the reported cases. It is submitted that these premises constitute an industrial hereditament because they are used for turning spare parts into spare parts packed and processed in the manner required by the purchaser.

Erskine Simes, K.C., in reply. It is necessary to consider what is in fact done on the hereditament and not what use is made of the product after it has left the hereditament. It is submitted that packing goods in the way a particular customer may require is not an adaptation for sale.

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sub-s. 1, that the expression "industrial hereditament" means a hereditament used as a factory or workshop provided that the premises are not primarily used inter alia "for the "purposes of distributive wholesale "business". Sub-s. 2 provides that "factory" and "workshop" shall have the same meaning as in the Factory and Workshop Acts, 1901 to 1920.

(2) [1901] 2 K. B. 209.

(3) [1931] A. C. 446, 461.

(4) [1931] A. C. 151.

(5) [1931] A. C. 446, 488.

(6) [1947] K. B. 958.

(7) [1949] 2 K. B. 10.

(8) [1931] A. C. 446, 488.

(9) [1947] K. B. 958.

(10) [1950] 1 All E. R. 937.

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EVERSHED, M.R. We have had the advantage of cogent arguments on both sides. Problems of this kind frequently turn upon extremely narrow distinctions. Many illustrations which have been canvassed during the argument have emphasized how narrow the point may be, and have shown that though in one case the right conclusion would probably be that the hereditament was an industrial hereditament, in another, in which the facts were very little different, the answer would be the other way. The point being such a narrow one, we have all taken the opportunity of considering whether we should reserve our judgment; but, having reached a conclusion on the matter, we have thought that in the circumstances there would be no advantage in delaying the pronouncement of our conclusion, which is that the decision of the tribunal ought not to be disturbed.

In one of the many cases cited under the name *Bailey* v. *Potteries Electric Traction Co. Ld.* (11) Scrutton, L.J., said: "In many cases it is a question of degree, which is in my view "fact and not law, and not properly the subject of a Special "Case". Beyond doubt in this case the tribunal have found that in fact the use made of the hereditament here did amount to an adaptation for sale. But it would not be right to say in a case of this character that it was a pure question of fact upon which there was nothing more which a Court of Appeal could say; for this question, whether or no the use made is an adaptation for sale, involves also the construction of the language of the Act. Upon that matter much illumination has been shed by many cases in the books, and not the least by a series of them to which much reference has naturally and properly been made, coming under the general heading *Sedgwick* v. *Watney, Combe, Reid & Co. Ld.* (12).

I will take this statement from the speech of Lord Dunedin in the cable case, *Grove* v. *Lloyds British Testing Co. Ld.* (13): "I think 'adapting for sale' points clearly to something being "done to the article in question which, in some way, makes it in "itself a little different from what it was before". I respectfully accept that as being the test which we must apply in this case, and I think that it was the test applied by the Lands Tribunal.

The facts are clearly stated in the special case, and I will therefore not take up time by an undue elaboration of the facts. The spare parts which are the concern of the company are not for sale or use in this country, for which purpose they would admittedly be finished and complete, but are for dispatch to different parts of the world for use there and particularly, as will appear, in order to be kept in store there against the occasion when they will be required, possibly in the course of active military operations. Putting it briefly, the sole function of the company is that of what is called " packaging " those articles. At first sight it might appear that the word " packaging " had only the doubtful advantage over the more usual word " packing " that it has an additional syllable, but I am not satisfied that that is quite to do justice to it. It is argued by the appellant valuation officer that, however elaborate be the actual process, and whatever the apparent significance of the word " packaging " as contrasted with " packing ", what this company do in truth is no more than to " pack " the particular articles, the spare parts, in such a way that they will arrive at their destination and be available to their ultimate user in the same finished condition in which they arrived at the premises of the company. The operation, it is contended, is, in effect, nothing more than that of the application of brown paper and string, so to speak, writ large; and since, therefore, the article, that is the spare part, is precisely and necessarily the same both before and after the " packaging " or packing operation, therefore, the test given by Lord Dunedin is not satisfied, and the article has not been made in itself any different from what it was before.

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(11) [1931] 1 K. B. 385, 495.

(12) [1931] A. C. 446.

(13) [1931] A. C. 446, 467.

On the other side it is argued that there is more to it than that: the article has been given a quality which it did not previously possess, namely, that of resisting severe climatic and other conditions, and also that of enduring under similar severe conditions for an appreciable length of time, which quality, too, it did not before possess. Furthermore, Mr. Willis has pointed out that the operations which this company conduct, and were formed to conduct, are conveniently set out in a Ministry of Supply pamphlet, which forms part of the tribunal's decision, prescribing the processes which *must*—and I emphasize that word —be carried out. And in particular Mr. Willis draws attention to one paragraph of that pamphlet which says that, unless those operations have been properly carried out, the article will not be accepted by the customer for whom it is intended.

In those circumstances, it is argued that, although the actual metal which forms the spare part does not undergo a change in the course of the operations of the company, nevertheless it has been made, as the result of those operations, a little different from what it was before. To put it in another way, as Mr. Willis, I think, did correctly, when all the facts are looked at it is not correct to say that the article in question is a particular spare part: it is something more than that: the thing eventually emerging from the hereditament is an article in a particular kind of package, and what is required at the other end of the earth is not a spare part alone but a spare part particularly packed.

Having so stated the two conflicting arguments, I think that the examination which has been made of the cases shows at least that it cannot certainly be asserted that packing an article or articles in a particular way in a particular package is necessarily no more than something which is a mere "prelude to distribu-"tion" (to borrow again the words of Lord Dunedin (14)). Another example was that of the boxes of chocolates packed by Messrs. Fuller which formed the subject of *Fullers Ld.* v. *Squire* (15). It is quite true, as Mr. Erskine Simes pointed out, that the box of chocolates is distinguishable from the spare part in that the former is, so to speak, a bulk article which consists of a number of chocolates, and that part of the operation, which is concluded when the box is tied with its ribbon and other ornament and it goes out to the public, consists in the proper selection and arranging of the chocolates. But it cannot be said that this circumstance of plurality in the contents of the package or box necessarily distinguishes cases of which *Fuller's* case (15) is an example from other cases, so that in the case of a single article packed in a particular case or package it must be said that the operation of packing is not the making of the article in some way a little different from what it was before. I think that in all cases of this kind it must, as Scrutton, L.J., observed, and Lord Dunedin too, be a question of degree, and prima facie it is one of fact.

I therefore turn at once to the special case and to the decision appended to it to see what are the facts which have been proved, and whether in the light of the general observations which I have made the conclusion which the Lands Tribunal arrived at can be sustained.

[His Lordship referred to the special case, and continued:] The relevant part of the judgment of the tribunal states as follows: "Whether or not the hereditament should be regarded "as having the status of a factory or workshop depends on the "answer to the question: Are the operations carried out there a

(14) [1931] A. C. 446, 463.

(15) [1901] 2 K. B. 209.

"packing or treatment in the ordinary commercial sense as a "mere prelude to distribution, or are they a treatment or process "with a view to adapting articles for the particular purposes for "which the customer requires them? It is true that the ball "bearings, etc., when they reach the factory are in a finished "state for sale and use in England, but the buyer does not "require those articles for use in England: he wants them for "use in distant parts and in different climates, and the evidence "before us was to the effect that they were not in a finished state "for that purpose. Something other than mere packing to enable "them to be carried away had to be done: a treatment involving "manual labour had to be applied. Our opinion, therefore, is "that the 'packaging' and special treatment of articles as carried "out at the hereditament here in question is within the description of 'making, altering, finishing or adapting for sale or "'incidental thereto'. Where a manufacturer contracts to "supply articles he manufactures 'packaged' and treated in a "special way designed to meet the requirements and needs of "his customer, our view is that we must regard the 'packaging' "of such articles as altering, finishing or adapting them for sale. "What the Ministry need and set out to buy from the manufacturer is not merely a spare part for a motor vehicle but a spare "part treated where necessary with a chemical or other preservative and 'packaged' in a way which will ensure that after "transit and storage, maybe in extreme climatic conditions, its "condition can be relied upon when it is required for use, perhaps "in a fighting vehicle engaged in combat; in a word, adapted for "the particular purpose for which the customer requires it".

In my judgment the Lands Tribunal applied a correct test to the problem with which they were faced, and I think that they were justified on the special facts of this case in concluding that the operations of the company were in truth something more than a mere prelude to distribution and did constitute a making of the article, in some way, a little different from what it was before. I think that that result may be reached by saying either that the article, being a spare part, was given additional qualities without the addition of which in acccordance with a particular specification the article would not answer the requirements of the customer; or, to put it in another way, that the article which was ultimately produced was a specially packed article. The articles were not being sent, to take another example, like glasses packed in a particular way to ensure that they arrived safely for immediate use as glasses by the customer: they were so sent that they could be not immediately used but stocked and preserved for perhaps some considerable time, a thing which could be only done provided that they came not merely as spare parts but as specially packed spare parts.

I am a little unwilling to embellish what I have said by analogy or illustration, because, as I have already observed, in questions of this kind distinctions are very fine. What may be said as an obiter dictum in one case may be relied upon on some other occasion.

But I think that the discussion is perhaps assisted by this kind of consideration: it is conceded, as I follow it, by the valuation officer that if, in order to make the articles immune against severe conditions of climate and stocking, they were covered with some sort of plating, then they would be rendered different because they were plated. If a spare part were plated, it would presumably no longer fit the machine for which it was made. It may, I think, not be an unfair way of looking at it to say that this special " packaging " was equivalent to a temporary plating giving the advantages of plating without alteration of the dimensions of the article. I do not pursue the analogy further, because I think that the tribunal were entitled to find from the special facts of this case that the production of these specially " packaged " articles satisfied the test which Lord Dunedin laid down.

Another case in the group of cases to which I have already alluded, that relating to the functions of the Union Cold Storage Company, deserves a little further examination, for it is plain from Lord Dunedin's speech (16) that arguments were there presented for the company which were in essence the same as, or at least similar to, Mr. Willis' argument here. An important fact found in that case was that " approximately 25 to 30 per cent. " of the produce received by the occupiers is fresh and requiring " to be refrigerated before export or sale in distant markets, and " the remainder, approximately 75 per cent., has been already " refrigerated and is kept by the occupiers in that state ". The problem in that case was whether the Union Cold Storage Company were deprived of the advantages of being an industrial hereditament by the proviso to s. 3, sub-s. 1, of the Act of 1928, whereby the expression " industrial hereditament " does not include a hereditament occupied and used as a factory and workshop if it is primarily occupied and used for the purposes, inter alia, of storage. The argument was that the refrigeration of the meat had the effect of giving a quality of endurance to the article which it did not previously possess, and indeed of effecting some physical change in the meat itself:

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(16) [1931] A. C. 446, 488.

"Your Lordships", said Lord Dunedin (17), "however, "heard from counsel for the appellants an ingenious argument to "support the view that the processes by which goods are frozen, "maintained frozen and defrosted, amount to an altering or adapting for sale of the goods within sub-s. 1 (*c*) of s. 149 of the "Factory and Workshop Act, 1901. It is pointed out that the "freezing of some articles of food alters them by destroying tissue "therein, that commercially all articles of food are altered by "refrigeration in the respect that they cannot afterwards be sold "as fresh, and that the several processes of freezing, maintaining "frozen and defrosting are for the most part carried out in order "that the goods may be preserved for sale at some future time or "may be made capable of transport to a distant market, or having "been preserved frozen for a future market may by defrosting be "made available at the appropriate time for that market.

"Upon this it is contended that the processes are really processes by which the goods are adapted for sale, even if not "altered in the freezing or defrosting processes, because without "the application to the goods of the appropriate process or processes they could not be sold in the particular market for which "they are destined by their owners. It may be difficult or "impossible to identify the essential quality of the operation "described in s. 149 of the Factory and Workshop Act, 1901, 'as "'the adapting for sale of any article', nor in my view is it "necessary for the purposes of this case to do so. The phrase "was probably introduced to secure somewhat more flexibility "than is to be found in the immediately preceding terms— "namely, 'the altering, repairing, ornamenting or finishing of "'any article'—but it cannot in my judgment be stretched to "cover the processes carried on by the appellants in the circumstances set out in the Special Case. Upon the facts of the "Special Case storage is beyond question, at any rate as to about "three-fourths of the goods handled, the primary purpose for "which the hereditament is occupied and used, and, though the "processes in question, as applied to such goods, may alter them "by affecting their quality, and though without their application "the goods might not be available for sale in the markets in

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(17) [1931] A. C. 446, 492, 493.

"which they are in fact ultimately sold, yet it is as incidental to "storage and to render storage possible and not otherwise that "the processes are applied".

I think it clear from that passage that Lord Dunedin is not rejecting altogether what he called the "ingenious argument" of counsel, and is certainly not saying that processes which may alter the article's quality in a way not dissimilar to the alteration alleged to be made by refrigeration, etc., were merely incidental to the purpose of storage and could not amount to an adaptation of the article for sale. What, as I read his speech, the noble Lord was saying is that, on the particular facts of that case, the process took the case out of the ambit of an industrial hereditament. I therefore do not think that there is anything in that speech which constrains me to hold that the argument of Mr. Willis cannot be sustained in the present case.

I therefore conclude that the decision of the tribunal should not be disturbed. I think that it was founded upon a proper inference from the facts found. I am glad to reach that view, for it seems to me, as a matter of common sense, to be one which should be supported. I find it difficult to say that the operations carried on on this hereditament are not according to common sense within the contemplation of what is called in the Act of 1901 a factory or workshop. I think that the case is so different in essentials from what has been called the milk case, that for my part I cannot derive assistance from the latter. Nor, in conclusion, do I think that the references to the destination of the spare parts and to the terms of the pamphlet involve any departure from the principle, of which Mr. Erskine Simes reminded us, that we must direct our attention to what is done on the hereditament. I think that has been done by the tribunal, and that the appeal should be dismissed.

JENKINS, L.J. I agree. The question whether a given operation amounts to the finishing of an article or the adapting of an article for sale within the meaning of s. 149 of the Factory and Workshop Act, 1901, is very much a question of fact and degree, and, in my view, this court should be slow indeed to reverse the decision of the tribunal on such a question, unless it be clear that the finding on the facts of the particular case was due to the application of some erroneous principle of law. As to the principle of law to be applied, it is no doubt true, and it is clearly established in the authorities, that, before it can properly be said that an article has been adapted for sale, it must be shown that there is some change or alteration in the article itself. The application of that principle necessarily depends on a question of fact, namely, what is the article with which the particular case is concerned. As to that, in the present case, it seems to me that there are two possible views, on which different minds might come to different conclusions.

The first possible view is that the relevant article is simply the spare part, a part of machinery or piece of apparatus, fit for immediate incorporation into a particular machine. On this view, it could be said that the company received on their premises spare parts and produced from their premises those same spare parts, not altered or changed at all, but merely packed so as to be available for distribution at home or abroad; and it might very well be right to conclude that there had been no adapting, and that there had been nothing more than packing incidental to distribution. That was the view which Mr. Erskine Simes, for the appellant valuation officer, invited us to adopt.

The other possible view, which commended itself to the tribunal, is that, on the facts and in the circumstances of this particular case, the relevant article cannot be regarded as finished or as adapted for sale until it has been subjected to the elaborate processes of preservation and "packaging" described in the stated case and insisted on by the Ministry of Supply. On that view of the facts it is reasonably plain that the articles here in question had undergone a change. They had been converted from mere loose parts, fit for immediate assembly, into spare parts so treated and packed as to be in a condition fitting them for use as spare parts and fitting them to be transported and stored in all sorts of climatic conditions. That seems to me to be a perfectly tenable view of the facts. It is the view which commended itself to the tribunal, and on that view of the facts, in my judgment, there was no obstacle at all as a matter of law to the conclusion at which the tribunal arrived, namely, that there was here a finishing or adapting of the parts in question.

The essential point in this case is, I think, well illustrated by *A. Richardson & Son* v. *Middlesbrough Borough Assessment Committee* (18), where eggs were collected from producers, cleaned, sorted and graded. It was held that what was done was an adapting of the goods for sale, although from one point of view what came on to the premises were eggs and what left the premises were eggs. Atkinson, J., thus put the point

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(18) [1947] K. B. 958.

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succinctly (19): " The question is whether the process carried " on in this factory was one of the adapting for sale of any " article. The article must not be regarded as an egg: what was " being dealt with were crates of eggs ". So, too, in the present case the articles being treated were not merely loose parts of machines but parts which were to be made available as spare parts so treated, packed and preserved as to be suitable for use as such in any part of the world and, it may be, after a considerable interval of time. Accordingly, for the reasons given by my Lord and those which I have added, in my view the decision of the tribunal should stand and the appeal should be dismissed.

Birkett, L.J. I agree with the two judgments which have been delivered. In the course of the interesting argument, I could not help feeling that, had we not been bound by the authorities, I should have found the solution of this problem very much simpler than it is. Apart from the quotations which have been made—for example, the passage quoted by the Master of the Rolls from *Sedgwick* v. *Watney, Combe, Reid & Co. Ld.* (20) about the importance of the facts found—I think that all the cases which have been cited in the course of the argument concerning different commodities emphasize the vast importance of the facts of the particular case.

In *Sedgwick* v. *Watney, Combe, Reid & Co. Ld.* (20) Lord Dunedin, after referring to *Inland Revenue Officer* v. *Younger* (21), a case which came from the Scottish Valuation Court and had in his view been wrongly decided, said (22): " Lord " Sands seems to have had difficulty, but in view of former cases " thought that it was well to lay down a general rule applicable " to each class of industry. This remark is a little dangerous. " Certain decisions will, it is hoped, prove of very general application, and so be of service to the local rating authority. But, " after all, the question is an individual one as to each particular " hereditament ". The important passage on which Mr. Erskine Simes relied at all times during the presentation of his argument was this: " I think ' adapting for sale ' points clearly to " something being done to the article in question which, in some " way, makes it in itself a little different from what it was " before ". Mr. Erskine Simes continually reiterated that passage, which was uttered in *Grove* v. *Lloyds British Testing*

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(19) [1947] K. B. 958, 963.
(20) [1931] A. C. 446.
(21) 1930 S. C. 548.
(22) [1931] A. C. 446, 465.

Company Ld. (23). The question was whether premises in which the testing of cable was carried on was an industrial hereditament. The Court of Appeal (24), by a majority, held that it was, Greer, L.J., saying (25): " The making of goods fit to be lawfully sold " is the immediate purpose for which the hereditament is " occupied ". Slesser, L.J., said (26): " The testing of the " cables in this case was, I think, a part of the process of making " them fit for the purpose of sale. Indeed, without such a " process their sale would have been prohibited by law. I " thus conclude that the phrase ' adapting for sale ', being so " generously construed, includes adaptation for selling ".

In the Divisional Court, however (which, by a majority, held that the premises were not entitled to be de-rated), Lord Hewart, C.J., had said: " The tester's task is not to adapt the cables for " sale, but to see that they have been so adapted ". When the case reached the Court of Appeal there was a difference of view as there was in the Divisional Court. Scrutton, L.J., there said (27), " cables are not adapted for sale but tested to see if they are fit " for sale ". That was a division of opinion on what appears at first sight to be a very simple question. Lord Dunedin said (28) (quoting the passage which Mr. Erskine Simes quoted to us): " I think ' adapting for sale ' points clearly to something being " done to the article in question which, in some way, makes it " in itself a little different from what it was before. Now, testing " does not in any way make the article different as an article " from what it was before. It only proclaims its character ". While that passage must be used as Mr. Erskine Simes used it, it is instructive to observe the exact mode by which it came into existence.

In the present case, I think, the tribunal certainly took into account the questions of law which they had to consider, and they set them out in the special case. I think that the tribunal considered not only the questions of law by which they were governed, but also very carefully the very special facts stated. In the judgment they said: " The evidence before us was to the " effect that " the goods " were not in a finished state for that " purpose. Something other than mere packing to enable them to " be carried away had to be done; a treatment involving manual " labour had to be applied. Our opinion therefore is that the " packaging and special treatment of articles as carried out at

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(23) [1931] A. C. 446, 450.
(24) [1931] 1 K. B. 385.
(25) Ibid. 519.
(26) Ibid. 526.
(27) Ibid. 515.
(28) [1931] A. C. 446, 467.

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" the hereditament here in question is within the description of " ' making, altering, finishing or adapting for sale or incidental " ' thereto ' ".

I think that the conclusion to which the tribunal came in this case on the facts, and applying the relevant law, was one to which they were entitled to come; and, after full consideration, I can see no adequate reason why that finding should be disturbed.

Evershed, M.R. The procedure which the tribunal have adopted here of stating a case and then setting out the facts in their written judgment has the disadvantage that there may be a difference between the facts set out in the special case and those set out in the judgment. It would appear to be better that the facts should be set out in the case stated only rather than in two documents.

Jenkins, L.J. It would do if, instead of annexing their written judgment to the case stated, the tribunal said in the case: " In our written decision we find the facts as follows ", and then set them out.

Evershed, M.R. That might be the most convenient way, for there is nothing in the rules which says that in their written decision the tribunal must set out the facts. They could make their written decision very short. No embarrassment has been caused in the present case by the procedure which has been adopted. But embarrassment might be caused in another case.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *The Solicitor of Inland Revenue; Gregory, Rowcliffe & Co., for Wright, Hassall & Co., Leamington Spa.*

B. A. B.

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June 25, 26.

Lord Goddard, C.J., Evershed, M.R., Somervell and Jenkins, L.JJ., Hilbery, Lynskey and Devlin, JJ.

WILLCOCK *v.* MUCKLE.

Emergency legislation — National registration — Duration of National Registration Act — National emergency not one and indivisible — Termination of statute by separate Order in Council—Identity card —Production demanded by police constable in uniform—Powers of police—Reasonable exercise—National Registration Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 91), *s.* 12, *sub-s.* 4, *s.* 6, *sub-s.* 4.

The National Registration Act, 1939, provides by s. 12, sub-s. 4: "This Act shall continue in force until such date as His Majesty "may by order in Council declare to be the date on which the "emergency that was the occasion of the passing of this Act came "to an end . . .".

Held, by Lord Goddard C.J., Somervell and Jenkins L.JJ., Hilbery and Lynskey, JJ.; Evershed, M.R., and Devlin, J., dubitantibus, that the national emergency which was referred to in that Act, and in those containing the same formula is not one and indivisible, but may have different aspects. On the true construction of the formula a separate Order in Council concerning the particular Act is required for the termination of each Act, and such orders may terminate the different statutes on different dates. Accordingly, as there had been no Order in Council concerning the National Registration Act, that Act remains in force.

Per totam curiam: The National Registration Act, 1939, which empowers the police to require a subject to produce his national registration, or identity, card was passed for security purposes, and the police ought not to use powers granted to them for those particular purposes for other purposes for which the powers were never intended. In particular it is wholly unreasonable for the police to require production of identity cards as a matter of routine whenever they interrogate a motorist for whatever cause. If a person is summoned before them for failure to produce his identity card on demand, justices should, in the absence of some real reason for the demand, grant the defendant an absolute discharge.

Case stated by Highgate justices.

An information was preferred by Harold Muckle, a police constable, against the defendant, Clarence Henry Willcock, charging him with having on December 7, 1950, at Finchley, failed to produce his national registration identity card when required to do so by the prosecutor, contrary to s. 6, sub-s. 4, of the National Registration Act, 1939 (1).

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(1) National Registration Act, 1939, s. 6, sub-s. 4: "A constable in uni-"form . . . may require a person "who under the regulations is for "the time being responsible for the "custody of an identity card, to pro-"duce the card to him or, if the "person so required fails to produce "it when the requirement is made, "to produce it within such time, to

At the hearing of the information the following facts were proved. On December 7, 1950, at Ballard's Lane, Finchley, the defendant, while driving his motor vehicle, was stopped by the prosecutor, who was in uniform. The constable asked the defendant to produce to him his national registration identity card, which the defendant refused to do. The constable told the defendant that he would issue him with a form to produce his identity card at any police station within two days, and the defendant replied: "I will not produce it at any police station "and I will not accept the form". The constable gave the form to the defendant, who threw it on to the pavement, from which another police constable picked it up and placed it in the defendant's motor vehicle. The defendant did not within the prescribed period produce his identity card at a police station or to any police officer.

On the part of the defendant it was contended, at the close of the case for the prosecution, that the National Registration Act, 1939, by s. 12, sub-s. 4 (1), thereof, was to continue in force until such date as His Majesty might by Order in Council declare to be the date on which the emergency which was the occasion of the passing of that Act came to an end and should then expire except as respects things previously done or omitted to be done; that in pursuance of the Courts (Emergency Powers) (End of Emergency) Order, 1950 (Statutory Instrument, 1950, No. 1647), dated October 9, 1950, it was declared that October 8, 1950, was the date on which the emergency which was the occasion of the passing of the Courts (Emergency Powers) Act, 1939, came to an end; that the emergency which was the occasion of the passing of the Courts (Emergency Powers) Act, 1939, was the same emergency which was the occasion of the passing of the National Registration Act, 1939; that, therefore, the right of a police constable in uniform to request the production of an identity card no longer existed because the statute creating that right had come to an end with the declaration that October 8, 1950, was the date on which the emergency came to an end; and that the summons was accordingly misconceived and disclosed no offence.

The justices were of the opinion that no Order in Council or

"such person and at such place as "may be prescribed".

Section 12, sub-s. 4: "This Act "shall continue in force until such "date as His Majesty may by Order "in Council declare to be the date "on which the emergency that was "the occasion of the passing of this "Act came to an end, and shall then "expire except as respect things "previously done or omitted to be "done".

other enactment had been passed repealing s. 6, sub-s. 4, of the National Registration Act, 1939; that, pursuant to reg. 20AB of the Defence (General) Regulations, 1939, s. 6, sub-s. 4, of the National Registration Act, 1939, was substituted by sub-para. 4 of reg. 20AB of the Regulations of 1939; and that pursuant to the Emergency Laws (Continuance) Order, 1950 (Statutory Instrument, 1950, No. 1770), dated November 2, 1950, reg. 20AB of the Defence (General) Regulations, 1939, was to continue in force for a further period of one year until December 10, 1951, unless previously revoked. They accordingly convicted the defendant, but granted him an absolute discharge.

The defendant appealed.

Marshall, K.C., *Emrys Roberts* and *Wigoder* for the defendant. The National Registration Act, 1939, was originally passed as a result of what was described as "the emergency", and s. 12, sub-s. 4, provided that it was to continue in force "until such "date as His Majesty may by Order in Council declare to be the "date on which the emergency that was the occasion of the "passing of this Act came to an end". Thirty-two Acts which were passed at about the same time, and of which the Courts (Emergency Powers) Act, 1939, was one, contain the same or a similar formula. An Order in Council dated October 9, 1950, provided that the emergency that was the occasion for the passing of the Courts (Emergency Powers) Act had ended, and, as that emergency was the same as the emergency in the case of the National Registration Act, namely, the outbreak or imminence of war, the National Registration Act is no longer in force. The thirty-two Acts include the Rent Restriction Act of 1939.

The Acts of 1939 used two different formulæ. Besides the one in the National Registration Act there was another which was used, for example, in s. 7 of the Armed Forces (Conditions of Service) Act, 1939: "In this Act—(*a*) the expression 'the period "'of the present emergency' means the period beginning with "the date of the passing of this Act and ending with such date "as His Majesty may by Order in Council declare to be the date "on which the emergency that was the occasion of the passing "of this Act came to an end". Such references to the national emergency first made their appearance in 1939—during the 1914 to 1918 war the duration of statutes was harnessed to such expressions as "the duration of the war" or "the period of hostilities". If Parliament had intended that there was a separate emergency for each particular Act, that result could have been most easily achieved by the use of the expression "for the purposes of this "Act", which had in fact been used in s. 21, sub-s. 2, of the National Service (Armed Forces) Act, 1939. It would not have been difficult for the draftsman to have set out in all those Acts a form of words which would have made each Act last as long as the executive should deem necessary, and words to that effect have been used in some of the Acts passed at the same time.

It is submitted that the Rent Restriction Acts have similarly come to an end because the Rent Restriction Act of 1939 harnessed the duration of the principal Acts to a day six months after the ending of the "emergency".

[JENKINS, L.J. Those who passed all the emergency legislation of 1939 may not have contemplated that the "emergency" might be regarded as one and indivisible and not as a separate one for each Act.]

That may well be, but if their view was a wrong one, and in fact there was only one emergency, it follows that the Acts in question have come to an end. Certain Acts are still in force in spite of the ending of the emergency, because the Statute Law Revision Act, 1950, has repealed the appropriate provisions in the Acts.

If it were argued that there were different national emergencies for the different statutes, it becomes important to note that since 1941 the legislature has anchored the duration of statutes very different in nature to one emergency the duration of which is defined in one Act—the Emergency Powers (Defence) Act, 1939.

As the emergency is nowhere defined, the court must have regard to the intention of Parliament when the Act in question was passed. If there was only one emergency, to which an end has been fixed for the purpose of one Act, the emergency must be terminated for the purpose of other Acts also.

[HILBERY, J. The emergency is always referred to as the emergency which was the occasion for the passing of a particular Act; it is never an emergency as defined in the Act.]

Sir Frank Soskice, *A.-G.*, and *J. P. Ashworth* as amici curiæ. The appeal raises a short point of construction on s. 12, sub-s. 4, of the National Registration Act, 1939. It is submitted that the meaning of that sub-section is that the Act should continue in force until an Order in Council should be made not merely specifying a certain date but specifying a date as being that on which the emergency came to an end, which was the occasion of the passing of the Act. Until an Order in Council declared that it was that emergency which had come to an end, the National Registration Act remained in force.

The court cannot possibly know that there was only one emergency. The word " emergency " is a description of events. It is a substantive carrying the attributes of an adjective: it carries with it a judgment of events. Certain events may create an emergency for one purpose but not for another. Since various Acts passed from 1945 to 1950 contain amendments of one or other of the Acts of 1939, it is clear that the legislature recognized by the plainest implication, if not by express terms, that the Acts of 1939 were still effective in later years and as recently as 1950.

There is an indication in s. 3, sub-s. 2, of the Possession of Mortgaged Land (Emergency Provisions) Act, 1939, that there may be an emergency operating for each of the Acts individually: that sub-section provided that the Act should continue in force so long as the Courts (Emergency Powers) Act, 1939, continued in force. That provision implies that the Courts (Emergency Powers) Act might come to an end at a time different from that at which other Acts of that year came to an end. Again, in 1940 and 1941 various Acts, such as the Liabilities (War-Time Adjustment) Act, 1941, were linked with the Courts (Emergency Powers) Act, 1939, being expressed to end on the date when the Act of 1939 came to an end, which predicates that the Act of 1939 may be brought to an end on a specified date not applicable to other Acts. Another illustration of the fact that there may be more than one emergency for the different purposes of different Acts is that on June 11, 1945, the ending of the " emergency ", this country was still at war with Japan.

The basic fallacy in the argument advanced on behalf of the defendant is that it does not distinguish between a scheme of events and the emergency relating to those events. There was a series of events which people called " the war ", but within that series there were different events and different aggregations of events constituting different emergencies. There are only two ways in which the court can know that there was only one emergency: because Parliament has said so in a statute or because the court knows as a matter of fact that there was only one emergency.

[SOMERVELL, L.J. Surely the question is simply one of construction, whether the legislature has proceeded on the basis that there was only one emergency or on the basis that each statute depends on an individual Order in Council.]

The highest the matter can be put is that there is an ambiguity; it cannot be said that it is a necessary implication from any of the Acts that there was one emergency only and that when that emergency came to an end the effect must be to bring all the Acts to an end.

Vernon Gattie for the prosecutor. It is desired to adopt the Attorney-General's argument and to give the court any information which they may require on the operation of s. 6, sub-s. 4, of the National Registration Act, 1939.

[LORD GODDARD, C.J. Why do the police, on speaking to a motorist who has left his car parked without lights, ask as a matter of routine for the production of his identity card?]

The police really want the motorist's registration number as a means of identifying him. The court before which a motorist comes for a motoring offence usually wishes to know whether he has committed similar offences before, and since 1941 New Scotland Yard has kept a card index giving a record of all motorists who have been before the courts and giving their national registration numbers. The production of identity cards in this manner prevents confusion between motorists of the same name and initials, who may even live at the same address.

Marshall, K.C., in reply. The word " emergency " must be given some meaning, but it is not right to construe it in the light of later Acts of Parliament. The right of construing earlier Acts by reference to later ones is a strictly limited one: see *per* Lord Radcliffe in *In re MacManaway* (2). Section 12, sub-s. 4, of the National Registration Act is not one which is " fairly and " equally open to divers meanings ", and, in the absence of any definition, it must be construed in relation to the circumstances prevailing at the time when it was passed. It was then common knowledge that the emergency was the imminence or outbreak of war. That was the only emergency although it had many sides in relation to the national life of the country. When Parliament envisaged that an emergency with regard to one Act might end before the general national emergency, words were inserted to cover that contingency, as in the Import Duties (Emergency Provisions) Act, 1939, where there was a proviso after the customary formula that an Order in Council might declare that it was no longer necessary for the Act to continue in force.

(2) [1951] A. C. 161, 177.

LORD GODDARD, C.J. The judgment which I am about to pronounce is that of myself, Somervell and Jenkins, L.JJ., and Hilbery and Lynskey, JJ. [His Lordship referred to the facts and continued:] Before the justices the defendant contended that the National Registration Act, 1939, was no longer in force. They held that it was in force, but they indicated their opinion of the conduct of the police officer in demanding the card, and of the defendant in not producing it, by granting him an absolute discharge.

The question that we have to decide is whether this Act is still in force. It is one of very great public importance, which is sufficiently indicated by the fact that this court of seven judges has been specially constituted to determine it.

The Act in question was passed on September 5, 1939, two days after the outbreak of the war. The Act provides that the people shall be registered and shall give certain particulars, and it provides, by regulations made under it, that national registration cards shall be produced on demand to police officers in uniform, and prescribes a penalty for refusal to do so. By s. 12, sub-s. 4: "This Act shall continue in force until such date as His Majesty "may by Order in Council declare to be the date on which the "emergency that was the occasion of the passing of this Act "came to an end, and shall then expire except as respects things "previously done or omitted to be done".

In the opinion, I think, of all the members of the court, the question raised is essentially one of construction. It was argued on behalf of the defendant that there was only one emergency which, in respect of other Acts passed at or about the same time as this one and in which the same formula is used, has been declared by various Orders in Council to be at an end, and accordingly that the emergency which occasioned the passing of this Act must be deemed to have been ended at the time when the first of these Orders in Council came into force.

On the other hand, it was argued on behalf of the prosecutor that there can be different aspects of the same emergency and that if the Crown has considered that a particular aspect no longer exists, so that the emergency which occasioned that particular Act to be passed has ended, it does not follow that all the Acts concerning other aspects of the same emergency are terminated.

In my opinion, and that of the judges who agree with me on this point, the latter argument is correct, and, on the true construction of this formula used in so many of the Acts passed at the outbreak of war, it is contemplated that to bring any one of these Acts to an end, there must be an Order in Council concerning that particular Act. It follows from this that an Order in Council is required to terminate each of the Acts in which this formula is used, and that such orders may do so on different dates. Accordingly, in our opinion the National Registration Act has not been terminated by reason of the first Order in Council which was passed so long ago as February 19, 1946, namely, the Regional Commissioners Act (Expiry) Order, 1946; and, as there is no Order in Council terminating the National Registration Act, 1939, we cannot say that the Act has been terminated.

Before I part with the matter I would make two observations: first, I think that the justices should be congratulated on the fact that their decision has been upheld by a court specially constituted to hear this appeal. Secondly, the court wishes to express its emphatic approval of the way in which they acted in granting the defendant an absolute discharge. Because the police may have powers, it does not follow that they ought to exercise them on all occasions or as a matter of routine. From what Mr. Gattie has told the court it is obvious that the police now, as a matter of routine, demand the production of national registration cards whenever they stop or interrogate a motorist for whatever cause. Of course if they are looking for a stolen car or have reason to believe that a particular motorist is engaged in committing crime, that is one thing: but to demand production of the card from all and sundry, for instance, from a woman who has left her car outside a shop longer than she should, or on some trivial occasion of that sort, is wholly unreasonable. This Act was passed for security purposes; it was never passed for the purposes for which it is now apparently being used. To use Acts of Parliament passed for particular purposes in wartime when the war is a thing of the past—except for the technicality that a state of war exists—tends to turn law-abiding subjects into lawbreakers, which is a most undesirable state of affairs.

Further, in this country we have always prided ourselves on the good feeling that exists between the police and the public, and such action tends to make the people resentful of the acts of the police, and inclines them to obstruct the police instead of assisting them. For those reasons I hope that if a similar case comes before any other bench of justices, they will deal with it as did the Highgate bench and grant the defendant an absolute discharge, except, of course, where there is a real reason for demanding sight of the registration card. Parliament, in the Road Traffic Acts of 1930 and 1934, provided for endorsements on licences and other matters, and if the police think that those provisions do not give them sufficient powers, or that the administration of those Acts is difficult, they can go to Parliament and ask for further powers; but they ought not to use, as they have done in this case, a security Act which was passed for a particular purpose.

For these reasons, although the court dismisses the appeal it gives no costs against the defendant.

EVERSHED, M.R. Although I do not dissent from the conclusion which Lord Goddard, C.J., has expressed, I think that, having regard to the importance of the case and the arguments delivered, it is right that I should briefly state the difficulties which I have felt in concurring with the judgment which has been delivered.

For my part, when regard is had to the measures which appeared on the Statute Book from the end of August to the middle of September, 1939, I feel great difficulty in accepting the view that Parliament intended to deal with these matters on the footing that there were numerous and distinct emergencies; and equal difficulty in accepting the proposition that, though there was but one emergency, Parliament was intending to deal distinctly with several manifestations of it. That, however, is not, in my judgment, the end of the matter; for the question is really one of construction which may be briefly stated as being whether what has been called " the usual formula " to be found in these Acts means that any particular Act ceases to operate at the time stated by a declaration by His Majesty in Council following a particular form and referable to the particular Act whatever may be the extraneous circumstances; or whether the formula, as Mr. Marshall has contended, is merely a periphrastic statement of the words " the present emergency ".

I confess that, if the matter rested with me alone, I should feel a strong inclination towards the latter view. I have placed some reliance in this respect upon the language of the first of the Acts, the Emergency Powers (Defence) Act, 1939, and upon the circumstance that there is available, and was there used by Parliament, a formula which would have exactly expressed the intention of Parliament if the former view had been intended.

But I do not think that the matter entirely rests with that point of construction. Having regard to the view taken by the majority of the court, it would be impertinent to assert that the matter of construction was not one which was (within the meaning of Lord Buckmaster (3) in the passage cited in *In re MacManaway* (4)) " fairly and equally open to divers meanings ". If that be so, then there would be strong ground at least for saying that reference could be had to later legislation, and that reference seems plainly to indicate that Parliament thereafter consistently thought that the meaning of the earlier Acts had been that for which the Attorney-General has contended.

I have also been deterred from expressing any final conclusion on the point of construction by the consideration, that if the view for which Mr. Marshall has contended be right, I am far from satisfied that the conclusion would not rightly be that none of the Orders in Council so far made and purporting to put an end to particular Acts has had any effect at all, on the ground, as the Attorney-General stated, that they would have been made alio intuitu.

I propose to say no more than to give expression to the difficulties which I have felt. But with regard to that part of my Lord's judgment which concerns the exercise by the police of their powers, as distinct from the existence of those powers, I would like to express my emphatic affirmation.

Devlin, J. I share the doubts which have been expressed by Evershed, M.R., on the construction of this statute; and I entertain, also, doubts on other points that were discussed in the course of the argument. In ordinary circumstances I should have taken time to resolve them, but, as this is a point of great importance upon which it is desirable that a speedy decision should be given, and as the majority of the court have reached a clear conclusion upon it, I think that no public advantage would be served by any elaboration of the doubts at present in my mind.

I also wish to say, in relation to the concluding observations of Lord Goddard, C.J., that I entirely agree with them. I think that it would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated under different circumstances and for different purposes.

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(3) [1928] A. C. 143, 156.

(4) [1951] A. C. 161, 177.

Appeal dismissed.

Solicitors: *Lucien Fior; Solicitor, Metropolitan Police; Treasury Solicitor.*

S. C.

1951
June 18, 19, 20, 21, 22;
July 6.

McNair, J.

SHANKLIN PIER LD. *v.* DETEL PRODUCTS LD.

[1949 S. 499.]

Sale of goods—Express warranty—Warranty given by seller to plaintiff—Consideration that plaintiff should cause buyer to buy—Breach of warranty—Plaintiff's right of action against seller.

A seller of goods is liable on an express warranty given by him to the promisee who in consideration of the warranty causes a third party to buy the goods so warranted and suffers damage by reason of the breach of the warranty.

ACTION.

The plaintiffs were the owners of a pier at Shanklin, in the Isle of Wight, which, during the war, was partly demolished and allowed to fall into disrepair. On July 22, 1946, they entered into a contract with contractors to have the necessary repairs effected and to have the whole pier repainted with two coats of bitumastic or bituminous paint. Under this contract the plaintiffs had, however, the right to vary the specification.

On July 22, 1946, the South Coast director of the defendant company, as a result of an inquiry by the plaintiffs, went to Shanklin with the object of obtaining for his company the contract for the repainting or for the materials for the repainting of the pier. He there saw the managing director of the plaintiff company, and later also the plaintiffs' architect, and told them that certain paint manufactured by the defendants and known as D.M.U. would be suitable for the work. He showed a pamphlet to the architect which stated that two coats of D.M.U. applied to a clean metal surface would keep the underwater surface, top sides, and wind and water line of a ship free from corrosion for over four years. He told the architect that the paint was not subject to creep, suggested that two coats should be used on the pier as a protective coat, and promised him that it should have a life of at least seven to ten years.

On the faith of those statements the plaintiffs caused the specification in their contract with the contractors to be amended by the substitution of two coats of D.M.U. That paint was bought by the contractors from the defendants and applied to the pier, but it proved to be unsatisfactory and lasted only about three months.

The plaintiffs, by their statement of claim, now claimed against the defendants that, in consideration of the plaintiffs' specifying that the contractors should use for repainting the pier two coats of a paint known as D.M.U., manufactured by the defendants, the defendants warranted that the D.M.U. paint would be suitable for repainting the pier, would give a surface impervious to dampness, would prevent corrosion and the creeping of rust, and would have a life of from seven to ten years. The plaintiffs further alleged that, in reliance on that warranty, they duly specified that the contractors should use D.M.U. paint for repainting the pier in lieu of the bituminous paint originally specified; that the contractors bought quantities of the paint from the defendants and used it on the pier; and that, contrary to the warranty, the paint was not suitable for repainting the pier or for the protection of the pier from damp or corrosion or rust, and its life was of a very short duration, with the result that the plaintiffs were put to extra expense amounting to 4,127*l*.

Diplock, *K.C.*, and *J. C. Leonard* for the plaintiffs.
K. E. Shelley, *K.C.*, and *Aldous* for the defendants.

Cur. adv. vult.

July 6. McNair, J. This case raises an interesting and comparatively novel question whether or not an enforceable warranty can arise as between parties other than parties to the main contract for the sale of the article in respect of which the warranty is alleged to have been given. [His Lordship stated the facts set out above and continued:]

The defence, stated broadly, is that no warranty such as is alleged in the statement of claim was ever given and that, if given, it would give rise to no cause of action between these parties. Accordingly, the first question which I have to determine is whether any such warranty was ever given. [His Lordship reviewed the evidence about the negotiations which led to the acceptance by the plaintiffs of two coats of D.M.U. in substitution for the paint originally specified, and continued:]

In the result, I am satisfied that, if a direct contract of purchase and sale of the D.M.U. had then been made between the plaintiffs and the defendants, the correct conclusion on the facts would have been that the defendants gave to the plaintiffs the warranties substantially in the form alleged in the statement of claim. In reaching this conclusion, I adopt the principles stated by Holt, C.J., in *Crosse* v. *Gardner* (1) and *Medina* v. *Stoughton* (2) that an affirmation at the time of sale is a warranty, provided it appear on evidence to have been so intended.

Counsel for the defendants submitted that in law a warranty could give rise to no enforceable cause of action except between the same parties as the parties to the main contract in relation to which the warranty was given. In principle this submission seems to me to be unsound. If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A.

Counsel for the defendants, however, relied upon the decision of the Court of Appeal in *Drury* v. *Victor Buckland Ld.* (3), and particularly upon the judgment of Scott, L.J. (4). In that case the plaintiff, who had been approached by an agent of the defendants, dealers in refrigerating machines, agreed to purchase such a machine, but, being unable or unwilling to pay forthwith the whole of the purchase price, the deal was put through by the defendants' selling the machine to a finance company, who in turn entered into a hire-purchase agreement with the plaintiff, under which she eventually, when the whole of the hire-purchase instalments had been paid, acquired title to the machine. The machine proving unsatisfactory, the plaintiff sued the defendants, claiming damages for breach of the implied warranty or condition under s. 14, sub-s. 1, of the Sale of Goods Act, 1893.

The claim failed, Scott, L.J., saying (4): "It was a sale by "the Buckland Company [the defendants] to the hire-purchase "company. The property passed to them on the terms that they "[the defendants] would get paid by the hire-purchase company.

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(1) (1688) Comb. 142.

(2) (1700) 1 Salkeld 210.

(3) [1941] 1 All E. R. 269.

(4) Ibid. 273.

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"Therefore, the claim against them [the defendants] for damages "for breach of warranty is a cause of action unsupported by any "contract of sale which would carry it". This judgment can readily be understood in relation to its subject-matter, namely, an implied statutory condition or warranty arising out of a contract of sale, and one can well understand it being said that, as there was no contract of sale between the plaintiff and defendants, no such implied warranty or condition could arise between them; but I do not read it as affording any support for the wider proposition for which counsel for the defendants contended.

The same view of the effect of this judgment as I have indicated was, I think, taken by Jones, J., in *Brown* v. *Sheen and Richmond Car Sales Ld.* (5), a case in which the judge entered judgment against a motor car dealer on an express oral warranty given in relation to the purchase of a car, the transaction, as in *Drury's* case (6), being carried through with the assistance of a finance company. It was here sought to distinguish *Brown's* case (5) on the ground that in the statement of facts in the report in All England Law Reports (7) it was stated that "the plaintiff agreed to buy" the motor car from the defendants, but the pleadings in *Brown's* case (5), which I have examined, lend no support for suggesting that in that case there was in any legal sense any agreement to sell between the plaintiff and the defendants. The judgment of Hilbery, J., in *Parker* v. *Oloxo Ld.* (8) also, I think, negatives the defendants' submission in the present case.

Accordingly, in my judgment the plaintiffs are entitled to recover against the defendants damages for breach of the express warranties alleged.

Judgment for the plaintiffs.

Solicitors: *Cripps, Harries, Hall & Co.; P. H. Brashier & Co.*

R. P. C.

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(5) [1950] W. N. 316; [1950] 1 All E. R. 1102.

(6) [1941] 1 All E. R. 269.

(7) [1950] 1 All E. R. 1102, 1103.

(8) [1937] 3 All E. R. 524, 529.

C. A.

1951
July 26.

Evershed, M.R., Jenkins and Birkett, L.JJ.

DELLENTY *v.* PELLOW.

[Plaint No. 9828.]

Landlord and Tenant—Rent Restriction—Controlled premises—Arrears of rent—Claim for possession—Payment into court before judgment—Whether "reasonable" to make order for possession—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *Sch. I.*

The county court judge made an order for possession of premises within the Rent Restriction Acts on the ground of non-payment of rent, which was a year in arrear. The arrears were paid into court before judgment, but the tenant had a bad record for non-payment of rent, having had to be summoned repeatedly.

On his appeal from the order for possession, the tenant contended (1.) that it was not reasonable to make the order since all arrears of rent had been paid before judgment; (2.) that as under s. 212 of the Common Law Procedure Act, 1852, the payment of arrears of rent into court had the effect of relieving the tenant from forfeiture, he should be granted relief on paying the arrears into court.

Held, (1.) that the court had jurisdiction under Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, to make an order for possession whenever rent was unpaid and it considered it reasonable so to do, and that although in the ordinary case payment of the arrears into court would make it unreasonable to make an order for possession, in the present case having regard to the tenant's record, there was evidence on which the judge could conclude that it was reasonable to make an order; and (2.) that s. 212 of the Common Law Procedure Act, 1852, which applied in the case of a contractual tenancy could have no application to a tenant holding over under the Rent Restriction Acts, for his rights as such a tenant only arose after the contractual relationship of landlord and tenant had ceased.

APPEAL from an order of Judge Clarke sitting at Ilford county court.

On May 31, 1951, the county court judge made an order for possession of a house which was within the protection of the Rent Restriction Acts, on the ground of non-payment of rent. The judge considered that it was reasonable to make the order notwithstanding the payment into court before judgment of the whole of the arrears of rent, as the tenant had a bad record, and had repeatedly been summoned for non-payment of rent.

The tenant appealed from the order for possession, the principal ground of appeal being that the county court judge had omitted to consider the question whether it was reasonable to make an order in view of the fact that the tenant had paid the rent in arrear into court before judgment. A further ground of appeal concerning the validity of the notice to quit does not call for report.

B. Caulfield for the tenant. All arrears of rent had been paid when the order for possession was made, and in the circumstances it was not reasonable to make the order. Where the only ground on which possession is sought is non-payment of rent, and the arrears have been paid into court before judgment, an order for possession should not be made: see *Brookes* v. *Goodbun* (1). [He also referred to Foa on Landlord and Tenant (7th ed.), p. 663, and Megarry on the Rent Restriction Acts (6th ed.), p. 195.]

Moreover, under s. 212 of the Common Law Procedure Act, 1852, the court is not entitled to consider whether it is reasonable to make an order for possession where arrears are paid into court and the proceedings are thereby terminated. It could not have been intended to give a tenant less rights in this respect under the Rent Restriction Acts than he had under the Act of 1852.

J. May for the landlord was not called on to argue.

JENKINS, L.J. The order for possession made by the county court judge is challenged in this court on two grounds. In the first place it is said that it could not be reasonable to make an order for possession in this case inasmuch as the ground on which possession was sought was arrears of rent, and admittedly the whole of the arrears had been paid into court before judgment. It is argued that in those circumstances it could not have been reasonable for the judge to make the order. Secondly, it is said that the proceedings were misconceived, inasmuch as the contractual tenancy had not been validly determined by notice to quit.

I would agree, taking the questions in that order, that prima facie where possession is sought on the ground of non-payment of rent, and the tenant pays the rent into court, or tenders it before judgment, it would not be reasonable to make an order for possession. But in this case the evidence showed that there had been a long history of default on the part of the tenant, and that time after time it had been necessary to issue a summons against

(1) (1946) 147 Estates Gazette 593.

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him before the rent could be extracted. This time again he had allowed his rent to fall into arrear for more than a year, and did not pay until the summons was issued and the case was about to be heard. Accordingly, in my view, in the particular circumstances of this case there was evidence on which the judge could come to the conclusion that, although the rent was actually paid into court before his judgment, nevertheless it was a case in which it would be reasonable to make an order.

An argument was raised by Mr. Caulfield based on s. 212 of the Common Law Procedure Act, 1852. He pointed out that if an ordinary contractual tenancy had been here in question the tenant would have been entitled as of right to relief from forfeiture upon paying into court or tendering to the landlord the full amount of the arrears of rent and costs. Having done that he would have been restored in his position as tenant, the forfeiture brought about by the proceedings being remedied by force of the statute. Mr. Caulfield submitted that the principle of the Common Law Procedure Act should be applied, as it were by analogy, to the case of a statutory tenant. In that I am unable to follow him, for the effect of the Rent Restriction Acts is to suspend or restrict the landlord's right to possession of premises after the contractual relationship of landlord and tenant has ceased. There is therefore no ground for holding that the landlord is to be denied possession of premises comprised in a statutory tenancy, in any of the cases in which those Acts allow an order for possession to be made, and in which the court thinks it reasonable to make such an order, because in similar circumstances a tenant under a contractual tenancy would have had a statutory right to relief from forfeiture.

There is no doubt power under Sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, to make an order for possession if the court thinks it reasonable to do so where "any rent lawfully due from the tenant has not been paid". Where the landlord shows that at the beginning of the proceedings there was rent in arrear, then jurisdiction arises under that provision. The only effect in such a case of payment of rent into court before judgment is that ordinarily it would not then be reasonable for the judge to make the order. On the facts to which I have already briefly referred there were, in the particular circumstances of this case, grounds on which the judge could properly hold that it was reasonable to make an order for possession although the rent had been paid into court before judgment.

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The second submission for the appellant was to the effect that the tenancy had never been validly determined by notice to quit. [His Lordship considered that question, which, as stated, does not call for report, and concluded:—] For these reasons I am of opinion that this is not a case in which this court should interfere with the decision of the judge, and I would dismiss the appeal.

Birkett, L.J. I agree.

Evershed, M.R. I am also of the same opinion.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co., for Hatten, Asplin, Jewers & Glenny, Barking; Gibson & Weldon, for J. Wilkie Johnstone, Budleigh Salterton.*

I. G. R. M.

NATIONAL COAL BOARD *v.* J. E. EVANS & CO. (CARDIFF) LD. AND MABERLEY PARKER LD.

[1949 N. 762.]

C. A.
1951
June 11, 12, 13.
Cohen, Singleton and Morris, L.JJ.

Trespass—Electric cable placed under land without knowledge or consent of landowner—Contract with landowner to excavate trench in land—Contractor unaware of cable—Injury to cable during excavation—Contractor's act not wrongful since neither wilful nor negligent—Sole fault that of the person placing cable on land—No liability in trespass.

An electrical cable had been placed under the land of a county council by the plaintiffs or their predecessors, without, so far as was known, either the knowledge or consent of the county council who, so far as a negative proposition could be established, did not at the relevant time know of its existence under their land. The council contracted with the first defendants to excavate a trench on this land, the proposed line of which in fact passed athwart that of the cable, handing to them a plan of the land which did not show the cable. The first defendants sub-contracted with the second defendants to excavate the trench, and their driver, in the course of doing so with a mechanical excavator, struck a cover of the cable and the cable, so that damage resulted. The plaintiffs claimed in trespass against both defendants.

Held, that there was no liability in trespass, since the act was involuntary and accidental. The act of the second defendants' driver was neither negligent (so found by the trial judge) nor wilful, and was "utterly without his fault". The injury was in the main attributable to the plaintiffs or their predecessors, who had committed trespass by placing their cable under the land of the county council without their knowledge or consent.

Weaver v. *Ward* (1607) Hob. 134, *Holmes* v. *Mather* (1875) L. R. 10 Ex. 261, and *Stanley* v. *Powell* [1891] 1 Q. B. 86 followed.

Decision of Donovan, J. reversed.

Appeal from Donovan, J., sitting at Glamorganshire Assizes.

In August, 1948, the first defendants secured from Glamorganshire County Council a contract to erect new workshops at the School of Mines, Treforest, Pontypridd. The work to be done included the cutting of a trench about 150 to 200 yards long from the new workshops across land occupied by the School of Mines and owned by the county council to a manhole just outside that land. The first defendants sub-contracted with the second defendants for the excavation of this trench. The first defendants were supplied with a plan by the county council for the purpose of their work. This plan showed the line of the required trench, but did not show that an underground cable, the property of the plaintiffs, carrying electricity at a pressure of 33,000 volts, ran under the land, athwart the line of the proposed trench at a depth of three feet, the same depth as the trench would have, where it met the cable. In September, 1948, the first defendants marked out for the second defendants the line of the required trench, and the second defendants began to make the excavation with a mechanical excavator. The excavator hit and broke the concrete cover of the cable and hit the cable itself, thus causing damage which eventually broke the circuit. Donovan, J., found as a fact that the driver of the excavator knew at the time what he had done, and that the clerk of the works of the county council, who was in charge of the works on the site, and the manager of the second defendants, knew on the same day or very shortly afterwards what had happened. Neither of the officials nor the driver reported the matter with a view to the facts being brought to the notice of the owners of the cable, since they considered that no real harm had been done to the cable.

The cutting of the trench was finished, an earthenware pipe was laid in it, and the trench was filled in. In May, 1949, the supply of electricity carried by the cable failed. The fault was located at the site where the cable crossed the trench and it was found that the cable had been damaged by the excavator in such a way that during the ensuing months water had seeped slowly through the insulating cover and had eventually made contact with the live core of the cable, causing an explosion which blew a hole in the cable and cut off the current. Donovan, J., found that this was the result of the damage done to the cable by the excavator in the previous autumn.

There was an electric pylon on the same land as that in which the trench had to be cut, about 50 yards from where the cable was struck. There was a second pylon about 400 yards distant from the first. The electric cable came overhead from Cwm Colliery, went down the first-mentioned pylon into the earth, emerged at the second pylon and continued overhead to the Albion Colliery, the destination of the electric current. Had the cable run underground in a straight line between the two pylons it would have been nowhere near the line of the required trench.

The plaintiffs in their action claimed damages against both defendants, alleging trespass and negligence. Their particulars of negligence were: "(a) Neither of the defendants took any "or any effective measures to discover whether there was any "electric cable in the way of their excavations; (b) neither of the "defendants took any steps to prevent damaging objects buried "beneath the surface; and (c) the defendants worked or controlled "the mechanical excavator so unskilfully that it damaged the "electric cable". The plaintiffs also pleaded: "Although both "defendants knew that the said cable had been seriously damaged "in or about the month of September, 1948, neither of the defen-"dants gave any notice of such happening to the plaintiffs, and "the plaintiffs knew nothing of the matter until May 3, 1949, "when, by reason of the foregoing damage and the consequent "deterioration of the cable through the seeping in of water and "otherwise, the cable broke down and the electric current was "cut off".

The question was raised at the trial whether on the pleadings the plaintiffs could rely on alleged negligence on the part of the defendants in failing to give immediate notice to the plaintiffs, the owners of the cable, of what had happened when the cable and its cover were struck. Junior counsel considered what amendment might be necessary but none was made. Though Mr. Lloyd-Jones, for the plaintiffs, raised the point in his opening speech, where objection was taken, he did not pursue the matter in his final speech. The Court of Appeal held that in these circumstances he could not raise this issue on the appeal, Cohen, L.J., stating that even if Mr. Lloyd-Jones had been allowed to raise the point he thought that, if there were any duty at all on

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the defendants, it would have been to report to the Glamorgan County Council, under whose orders they were acting in carrying out the work and who were the owners of the land and, so far as they knew, the only persons interested in it.

Donovan, J., found no negligence as pleaded on the part of the defendants. He said that the suggestion that, owing to the presence of the pylons, the defendants should have dug trial holes by hand along the line of the proposed trench put far too big a burden on the first defendants, who had received a plan from their principals, the county council, the owners of the land, showing no electric cable on the line of the intended trench. The first defendants assumed that the plan was correct, that being the normal practice among contractors.

But on the issue of trespass his Lordship found for the plaintiffs, awarding them 500*l.* damages. As to the point taken that the injury was involuntary and accidental, he said that he thought that merely another way of pleading inevitable accident; but, on the facts of the case, there was no inevitable accident. The absence of information as to the existence of the cable and where it was sited, in his opinion, afforded no defence against the allegation of trespass.

Both defendant companies appealed.

Sutton, K.C., for both defendants, with *Meurig Evans* for the first defendants and *David Pennant* for the second defendants. The question raised here is whether, where a man is carrying out legitimate operations on land for, and with the authority of, the owner of the land, he does so at his peril, with the result that he will be liable in trespass if he injures something belonging to a third party buried under the surface of the land, the presence of which neither he nor the owner of the land had any reason to suspect, and of which both were quite unaware.

No doubt, there are certain things which a man may be said to do at his peril, such as discharging firearms in the highway, which apparently is what the defendant did in *Dickenson* v. *Watson* (1), or when playing cricket driving a ball into the highway, and he must accept responsibility for any damage which he thereby causes to the person or property of another; and it may be that dicta can be found in the earlier cases (which often turn on questions of pleading or the form of action), which lend support to the view that a man is answerable for the direct consequences

(1) (1682) Sir T. Jones 205.

of any voluntary act of his: see, for instance, *Dickenson* v. *Watson* (1), the dissenting judgment of Raymond, C.J., in *Bessey* v. *Olliott* (2), and the judgment of Grose, J., in *Leame* v. *Bray* (3).

There is, however, no actual decision to that effect, and there are dicta to the contrary from which it would appear that " inevitable accident ", that is to say an accident " not avoidable by " any such precaution as a reasonable man, doing such an act " then and there, could be expected to take " (Pollock on Torts (12th ed.), p. 137), is available as a defence to an action of trespass. Even in *Weaver* v. *Ward* (4), where in action for trespass of assault and battery for injury caused by a firearm a plea that the accident happened " casualiter and per infortunium and " contra voluntatem suam " was held bad, the court added: " And therefore no man shall be excused of a trespass . . . except " it may be judged utterly without his fault. As if the defendant " . . . had set forth the case with the circumstances so as it " appeared to the court that it had been inevitable and that the " defendant had committed no negligence to give occasion to the " hurt ". [*Davies* v. *Saunders* (5), *Wakeman* v. *Robinson* (6), and judgment of Blackburn, J., in *Smith* v. *London & South Western Railway Co.* (7) were also referred to.]

To come to modern times, Bramwell, B., after reviewing the cases, said in *Holmes* v. *Mather* (8): " The result of them " (the cases) " is this, and it is intelligible enough: if the act that " does an injury is an act of direct force vi et armis, trespass " is the proper remedy (if there is any remedy) where the act " is wrongful, either as being wilful or as being the result of " negligence. Where the act is not wrongful for either of these " reasons, no action is maintainable, though trespass would be " the proper form of action if it were wrongful. That is the effect " of the decisions "; and Atkin, L.J., in *Manton* v. *Brocklebank* (9) said: " If *Holmes* v. *Mather* (8) be correctly decided, " trespass to goods must be the result of an act either wilful or " negligent ".

[Singleton, L.J. *Holmes* v. *Mather* (8) was a case of trespass to the person.]

True, but Atkin, L.J., evidently considered that the principles governing the law of trespass to the person and trespass to goods were the same, and there does not appear to be any reason for thinking that the law takes greater care of a man's goods than of his person. Denman, J., cited the above passage from the judgment of Bramwell, B., with approval in *Stanley* v. *Powell* (10), where he held, to quote the headnote, that "a trespass to the "person is not actionable if it be neither intentional nor the "result of negligence". This view of the law seems to have been taken in America many years previously: see *George Brown* v. *George J. Kendall* (11).

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(2) (1683) T. Raymond 467.
(3) (1803) 3 East 593.
(4) (1607) Hob. 134.
(5) (1770) 2 Chitty 639.
(6) (1823) 1 Bing. 213.
(7) (1870) L. R. 6 C. P. 14, 22.
(8) (1875) L. R. 10 Ex. 261, 268.
(9) [1923] 2 K. B. 212, 229.

It may also be observed that in *Ilford Urban Council* v. *Beal* (12), a case of nuisance and therefore not quite in point, Branson, J., negatived the proposition that an owner of land must at his peril ensure that his acts or omissions will not damage something buried beneath the land of the existence of which he does not know and has no reason to suspect.

In this case neither of the defendants either by themselves or their servants knew of the existence of the cable and, as far as a negative proposition can be established, it was shown that the county council knew nothing of its existence. Donovan, J., found that there was no negligence on the part of either of the defendants. The hitting of the cable by the excavator therefore was not the result of negligence, nor was it "wilful", a word which must imply some degree of intention. It was, however, the direct result, though the unintentional result, of a voluntary act. It is, therefore, for this court to decide the question, which has not previously come before the Court of Appeal, whether it be the law, though there is no decision to that effect, that a man is responsible for damage directly caused to the property of another by any voluntary act of his, or whether the dictum in *Weaver* v. *Ward* (13) that he may be excused if "the trespass be judged "utterly without his fault" and the decisions in *Holmes* v. *Mather* (14) and *Stanley* v. *Powell* (15) were correct: for it is not easy to imagine a case where a defendant could be more free from fault than were the defendants in this case, or where the damage complained of was more obviously due to an accident which could not be avoided by any precaution which a reasonable man could be expected to take.

Further, here the principle of volenti non fit injuria is applicable. The plaintiffs, who claim a possessory right to this cable, did not think it worth while to give any indication of its presence, three feet down, in another's land. The judge held that this did not amount to contributory negligence on their part, and it is not necessary to challenge his ruling, for it may be that the risk of damage to the cable was so remote that a prudent man would not think it necessary to take steps to guard against it. Still, they took this remote risk on themselves, and cannot complain now that it has materialized. Quite apart, therefore, from the fact that vis-à-vis the county council the plaintiffs were trespassers, it is submitted that the peril of the cable being injured by legitimate operations on the land under which it was buried should be and is their peril, and should not be and is not the peril of the defendants excavating in the course of their lawful work.

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(10) [1891] 1 Q. B. 86, 92.
(11) (1850) 60 Mass. Rep. 292.
(12) [1925] 1 K. B. 671.
(13) Hob. 134.
(14) L. R. 10 Ex. 261.
(15) [1891] 1 Q. B. 86.

Meurig Evans, following for the first defendants. There was no allegation by the plaintiffs in the pleadings that the county council who contracted with the first defendants to excavate the trench had any knowledge of the existence of the cable in their land. Nor was there any allegation that the plaintiffs had a right to place their cable on the land of the county council.

David Pennant, following for the second defendants. "Quidquid plantatur solo, solo cedit": see the observations of Lord Cairns, L.C., in *Bain* v. *Brand* (16). Once the cable had become part of the soil, the second defendants, who were lawfully excavating the soil, could not commit trespass.

[Observations of Lord Blackburn in *Wake* v. *Hall* (17) were referred to.]

Lloyd-Jones, K.C., and *Wallis-Jones* for the plaintiffs. The plaintiffs had a possessory right to the cable which was injured by the driver of the second defendants. Until 1875 there could have been no question, by reason of judicial decisions and of innumerable dicta, that the second defendants were guilty of trespass by injuring the cable. To that claim there were only two defences: (1.) I did not do the act, and (2.) I was entitled to do the act. Until 1875 if A drove into B, B had a cause of action in trespass subject to those two defences, and the onus was on the defendant to establish one of them. As Grose, J., said in *Leame* v. *Bray* (18): "Looking in to all the cases from "the Year Book in the twenty-first year of Henry VII down to "the latest decision on the subject, I find the principle to be that,

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(16) (1876) 1 App. Cas. 762, 767.

(17) (1883) 8 App. Cas. 195, 203.

(18) 3 East 593, 600.

" if the injury be done by the act of the party himself at the " time, or he be the immediate cause of it, though it happen " accidentally or by misfortune, yet he is answerable in trespass ". In the notes to Bullen and Leake's Precedents of Pleading (3rd ed. 1868) it is stated, at p. 411: " The act may be a trespass, " although unintentional (*Covell* v. *Laming* (19)); but if it be the " result of accident or of some agency over which the defendant " had no control, so as not to be his act, it is not a trespass: " *Gibbons* v. *Pepper* (20), *Hall* v. *Fearnley* (21), and *Wakeman* " v. *Robinson* (22) ". But this act was that of the defendants' servant, and it was not an accident, though the act was unintentional. The first of the two defences was: the defendants did not do the act, but here the vital fact is that the second defendants' servant did injure the cable.

The effect of *Holmes* v. *Mather* (23) was that the plaintiff must prove that the act was " wilful ". This was new law. That was the case of an accident on the highway. Bramwell, B., said (24): " For the convenience of mankind in carrying on the " affairs of life, people as they go along roads must expect, or " put up with, such mischief as reasonable care on the part of " others cannot avoid ".

It is submitted that Bramwell, B., was wrong when he said that, where the act was not wrongful for the reason that it was not wilful or the result of negligence, no action of trespass would lie. But it may be that the observation was limited to the facts of that case—an accident on the highway. To lay down so broad a principle generally was obiter and was not the ground of the decision. Cleasby, B., clearly decided the case on the ground that the act was not the act of the defendant. The observation of Grose, J., in *Leame* v. *Bray* (25) shows that this was an attempt in 1875 to alter the law, as also does the judgment of Lord Denman, C.J., in *Hall* v. *Fearnley* (26), a case of a street accident, where he said: " The authorities show that if the acci" dent had resulted entirely from a superior agency, that would " have been a defence, and might have been proved under the " general issue; but a defence admitting that the accident resulted " from an act of the defendant would not have been so provable ". Until 1875, if the defendant drove a vehicle into the plaintiff's vehicle, it was for the defendant to show that he had a defence—

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(19) (1808) 1 Camp. 497.
(20) (1695) 1 Ld. Raym. 38.
(21) (1842) 3 Q. B. 919.
(22) 1 Bing. 213.
(23) L. R. 10 Ex. 261.
(24) Ibid. 267.
(25) 3 East 593, 600.
(26) 3 Q. B. 919, 921.

he could say either that it was not his act or that, if it was his act, he was entitled to perform it. "Intention" under the law before 1875 was not material. "If the owner of a ship being "himself on board and standing at the helm unintentionally "runs her against another ship from unskilful management, the "remedy is trespass and not case: *Covell* v. *Laming* (27)."

Winfield writes in his Textbook of the Law of Tort (5th ed.), at p. 347: "One who negligently killed another's pigeons (Br. "Abr. Trespass, para. 63, A.D. 1373), or caused his ship to collide "with another (*Covell* v. *Laming* (27)), or who ignorantly took "another's goods (*Colwill* v. *Reeves* (28)), was just as liable "in trespass as if he had done these acts intentionally. Then "follows an apparently complete blank in the reports as to inadvertent trespass to goods, probably because the injured party "preferred the action for the nascent tort of negligence . . . "and now that this tort is fully established, he seems to have "forgotten such advantages as the action for trespass still possesses. But it is there, if he wishes to make use of it". Here the plaintiffs, the injured party, wish to make use of the action of trespass, which, it is submitted, is open to them.

The defence of inevitable accident is not available where the defendants' act has caused the accident: see Salmond on the Law of Torts (10th ed.), at pp. 339–40; also passages at pp. 24 and 318–19. There is a note at p. 340 of this edition: "Yet Salmond "(6th ed.), s. 117, apparently thought that actions of trespass "to the person were limited to cases of the *intentional* application of force. Such a limitation was expressly denied by Lord "Ellenborough in *Covell* v. *Laming* (29)". See also vol. 3 of the last edition of Holdsworth's History of English Law, at pp. 381–2. In the example given by Mr. Sutton in his work on Personal Actions at Common Law, at pp. 58–9, where a farmer shooting rabbits shot a pedestrian who was walking on a highway, the shot passing through a hedge and the farmer not knowing of the presence of the pedestrian, the author gives this as a clear instance of trespass, mentioning *Weaver* v. *Ward* (30) and *Underwood* v. *Hewson* (31), the sidenote of which is: "Trespass lies for an accidental hurt".

[COHEN, L.J. You are submitting that, if Mr. Sutton wins this case, he must re-write these two pages in the next edition of his book?]

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(27) 1 Camp. 497.
(28) (1811) 2 Camp. 575.
(29) 1 Camp. 497.
(30) Hob. 134.
(31) (1724) 1 Str. 596.

Yes.

[MORRIS, L.J. If a man buries his vase worth 1,000*l.* in his neighbour's garden without the knowledge of the neighbour, if the neighbour smashes the vase with his spade will an action of trespass lie against the neighbour?]

Prima facie an action of trespass would lie, but the defendant could say in justification that the trespass was not his act, since he did not put the vase there. Again, Holdsworth writes in his History of English Law, vol. 8, at p. 465, under the heading "The place of the mediæval principle of liability in modern "law": "We have seen that in certain cases, acts which infringe "another's possession of land or goods were and are justifiable. "But, apart from these exceptions, any interference with possession or the right to possess is an act which will entitle the "injured party to bring an action in tort. The fact that the act "is done accidentally, or in good faith, or under a justifiable "error is no defence"; and in a note the passage at pp. 381–2 of "The History" already mentioned is cited. By and large, the article on Trespass and Negligence in vol. 49 (1933) of the Law Quarterly Review, at p. 359, by Winfield and Goodhart tends to support the contention of the defendants.

McCardie, J., in *Gayler and Pope Ld.* v. *B. Davies & Son* (32) founded his decision, in the last analysis, that for injury caused by horses or cattle to property on or adjoining a highway, the owner was not liable in the absence of negligence or of wilful intention on his part, on the convenience of mankind, following Bramwell, B., in the case of accidents on the highway in *Holmes* v. *Mather* (33). There are passages in the judgment which suggest that McCardie, J., was deciding the case on the ground that the act done was not the act of the defendant. In *Tarlton* v. *Fisher* (34) Lord Mansfield said (35): "This is a direct action "of trespass, *quare vi et armis*, and not *on the case*, and there "is this distinction between them, which always ought to be "attended to. In *trespass*, innocence of intention is no excuse; "in case, the whole turns upon it; malice or the *quo animo* is "the very *gist* of the action". In *Knapp* v. *Salsbury* (36) Lord Ellenborough said that in the action of trespass intention was immaterial. Neither *Holmes* v. *Mather* (37) nor *Stanley* v.

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(32) [1924] 2 K. B. 75, 83.

(33) L. R. 10 Ex. 261, 267.

(34) (1781) 2 Dougl. 671.

(35) Ibid. 673.

(36) (1810) 2 Camp. 500.

(37) L. R. 10 Ex. 261.

Powell (38) is binding on the Court of Appeal, and it is submitted that the law as it stood in 1875, as to which there is no question, remains the law today.

Counsel then argued on the issue of negligence. He was stopped on the relevance of the maxim: "Quidquid plantatur solo, solo cedit".

Wallis-Jones followed.

Sutton, K.C., was not called on to reply.

COHEN, L.J. [after stating the facts]: Donovan, J., in discussing first the issue of negligence, said: "The plan received "by the first defendants from their principals, the Glamorgan "County Council, showed no electric cable beneath the land in "question. Usually, as one would expect, all underground cables "are shown on the contract plans to which the contractor has to "work. To the extent that no such cable is shown on the plan, "the practice of contractors is to assume that none exists, unless "of course there is some evidence on the site visibly contradicting "the plan in this respect.

"This attitude seems to me to be reasonable, and, indeed, the "plaintiffs do not assert the contrary. But, it is said, there was "evidence visible on the site of an underground cable. There "was an electric pylon on the same land as that in which the "trench had to be cut, and not far from the trench. The position "is shown on the plan, and I make the pylon to be some 50 yards "from where the cable was eventually struck. At this pylon "the electric cable, which hitherto has come overhead from Cwm "Colliery, goes down the pylon into the earth. Some distance "away, in the direction of the Albion Colliery, which is the "destination of the electric current, there is another pylon. I "make this second pylon some 400 yards distant from the first. "It is between these two pylons that the cable runs underground, "to emerge at the second pylon, and continue overhead to the "Albion Colliery.

"It is said on behalf of the plaintiffs to each of the first and "second defendants: 'You should have inspected the first pylon, "'which is on the same land as that in which you had to cut "'the trench. Then you would have seen that the cable there "'went into the ground. Next, you should have seen the second "'pylon, some hundreds of yards away, with a cable emerging "'from the ground. Thus you should have known or suspected

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(38) [1891] 1 Q. B. 86.

" 'that somewhere between those two pylons the cable ran underground. And, although the cable would be nowhere near the " 'line of the intended trench, if the cable ran in a straight line " 'between the two pylons, nevertheless you should have further " 'suspected that it might, as it does in fact, pursue an erratic " 'course between the pylons, and that that erratic course might " 'bring it, as in fact it did, across the line of the intended trench; " 'and, until these suspicions were confirmed or removed, it " 'was your duty to dig trial holes by hand along the line of the " 'proposed trench' ".

That was the judge's summary of the allegations of negligence, and on that he expressed his conclusions as follows: "In my "opinion, that is putting far too big a burden upon the first "defendants, who, having received plans from their principals, "Glamorgan County Council, showing no electric cables in the "line of the intended trench, assumed that the plan was right, "this being the normal practice of contractors. After all, "Glamorgan County Council owned the land, and should surely "be in a position to know what cables ran through their land".

That is a clear finding of fact and, even though it is quite true that here the question is largely what is the proper inference to be drawn from known facts, such as the position of the pylons, none the less I think that this court should be hesitant in interfering with this finding of fact by the trial judge. Even had I come to the conclusion that I might possibly have drawn a different inference, I should hesitate to interfere with his finding; but in this particular case I would respectfully express my agreement with the conclusion which the judge has reached, and I would add that, if it can be right to say that the defendants should have suspected that the cable might pursue an erratic line, I think that they would primarily have expected to find it laid under highways, as cables so often are, rather than under the land on which they were going to work. I therefore agree entirely with the judge's finding on the question of negligence as pleaded in the statement of claim.

I turn to the question of trespass. On this matter the judge found for the plaintiffs. He states that "the answer made by "the first defendants is that any such trespass was involuntary "and accidental, and therefore not actionable". Then he says that they say that the damage was too remote. That question I shall not have to determine. He went on: "They simply "instructed the second defendants to dig the trench, without "specifying" what should be done. Then he passes to the important point, that the trespass was involuntary and accidental, and comes to the conclusion that this was merely another way of pleading inevitable accident, and that on the facts of this case there was no inevitable accident. He states his reasons as follows: "It was intended to cut a trench by a mechanical "excavator, and to cut it where it was in fact cut, and, though "it was not intended to damage the cable, that result ensued, "not through some act over which the first defendants lacked all "control, but simply because they did not appreciate that what "they were designedly and deliberately ordering would bring the "excavator in contact with an electric cable. But this absence "of information affords them, in my opinion, no defence against "the allegation of trespass". Later on in the course of his judgment he finds that a cable had been put, without permission, on land not proved to be the plaintiffs'.

As I understand the judge's judgment, he held that, if the act of interference with the plaintiffs or their property was an act which the defendants intended to perform, it was wholly immaterial whether the act was lawful and whether the defendants knew or were justifiably ignorant of the fact that the act might injure the plaintiffs, because the plaintiffs' own unlawful conduct had prevented the defendants from being aware of the fact that their act might injure the plaintiffs or their property. The judge felt himself constrained by authority to hold that, even though the plaintiffs in the present case must be taken on the evidence before the court to have buried the cable under the land of the Glamorgan County Council without the knowledge of that council, the defendants were liable to the plaintiffs for the damage which the second defendants' excavator had caused.

Mr. Sutton took us through a number of authorities, and any gaps that he left were filled in by Mr. Lloyd-Jones. They started with *Weaver* v. *Ward* (39). In that case, "Weaver brought an "action of trespass of assault and battery against Ward. The "defendant pleaded, that he was amongst others by the com-"mandment of the Lords of the Council a trained soldier in "London, of the band of one Andrews captain; and so was the "plaintiff, and that they were skirmishing with their musquets "charged with powder for their exercise in re militari, against "another captain and his band; and as they were so skirmishing "the defendant casualiter and per infortunium and contra volun-

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(39) Hob. 134.

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"tatem suam in discharging of his piece did hurt and wound the "plaintiff, which is the same, etc., absque hoc, that he was guilty "aliter sive alio modo. And upon demurrer by the plaintiff, "judgment was given for him; for though it were agreed that if "men tilt or turney in the presence of the King, or if two "masters of fence playing their prizes kill one another, that "this shall be no felony; or if a lunatic kill a man, or the like, "because felony must be done animo felonico; yet in trespass, "which tends only to give damages according to hurt or loss, it "is not so; and therefore if a lunatic hurt a man, he shall be "answerable in trespass; and therefore no man shall be excused "of a trespass (for this is the nature of an excuse, and not of a "justification, prout ei bene licuit) except it may be judged "utterly without his fault".

It is to be observed that, even in that case, which was relied on by the plaintiffs, it was held that, where the defendant was entirely without fault, he would have a good defence to an action in trespass.

Some of the earlier authorities, most of which appear to have been decided on points of procedure, contain dicta which support the judge's conclusion. It will, I think, be sufficient if I refer to this observation of Grose, J., in *Leame* v. *Bray* (40): "Looking "into all the cases from the Year Book in the 21st year of "Henry VII down to the latest decision on the subject, I find "the principle to be that, if the injury be done by the act of the "party himself at the time, or he be the immediate cause of "it, though it happen accidentally or by misfortune, yet he is "answerable in trespass". That, it is said, is applicable in this case: since the defendants intended to use their excavator and to excavate whatever was found in the earth, therefore they are liable in trespass.

Speaking for myself, I cannot imagine a clearer instance of an accident which occurred utterly without fault on the part of the defendants. The cable was not visible; there was nothing on the plan of Glamorgan County Council to indicate its presence, and it had been placed there without the knowledge of the county council and without any permission from them. In those circumstances, I can see no ground for attaching any blame to the defendants. The damages seem to have been caused by the action of the predecessors in title of the plaintiffs themselves, who, the judge has found, placed their cable on the land in question without any legal right to do so and, so far as we know, without taking any steps to inform the county council or anyone else of the presence of the cable on the land.

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(40) 3 East 593, 600.

I would add that the dicta in the earlier cases do not, if read literally, appear to have been approved or followed in any modern case. On the contrary, in *Holmes* v. *Mather* (41), where an accident had occurred on the highway, the defendant's horses having run away and the plaintiff having been injured by them, Bramwell, B., said (42): "For the convenience of mankind in "carrying on the affairs of life, people as they go along roads "must expect, or put up with, such mischief as reasonable care "on the part of others cannot avoid. I think the present action "not to be maintainable". Then later (43) he stated the principle on which most of the discussion in this case turned. He said: "As to the cases cited, most of them are really decisions "on the form of action, whether case or trespass. The result "of them is this, and it is intelligible enough: if the act that "does an injury is an act of direct force vi et armis, trespass is "the proper remedy (if there is any remedy) where the act is "wrongful, either as being wilful or as being the result of negli-"gence. Where the act is not wrongful for either of these "reasons, no action is maintainable, though trespass would be "the proper form of action if it were wrongful".

Mr. Lloyd-Jones said that those observations, though apparently general, were really directed to the facts of the case before the court, which was a case of an accident on a highway. He called our attention to various statements in textbooks which indicated that the law applicable to accidents on a highway might be distinguishable from accidents which occurred on private property, because it could hardly be said that in the case of an accident on private property the arguments based on the convenience of mankind, which Bramwell, B., put in the forefront of his judgment, were relevant.

I see no logical reason for placing such a limit on the general observation of Bramwell, B.; but it is not necessary to express a final conclusion on this point. The accident in the present case was attributable mainly to the conduct of the plaintiffs in placing their cable on the land of the county council without the latter's knowledge and without any notification to them; and in these circumstances it would, I think, be not merely inequitable, but contrary to common-law principles as laid down in *Weaver* v.

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(41) L. R. 10 Ex. 261.
(42) Ibid. 267.
(43) Ibid. 268.

Ward (44), that the plaintiffs should be allowed to succeed. Clearly, I should have thought, they could not have succeeded in an action against the county council, since they were trespassers in placing their cable upon the land; and I cannot see any reason why the defendants should be in a worse position than the county council.

The only other case to which I need refer is *Stanley* v. *Powell* (45), which was tried before Denman, J. He cited with approval the observations of Bramwell, B., in *Holmes* v. *Mather* (46). Neither *Holmes* v. *Mather* (46) nor *Stanley* v. *Powell* (45) is binding on this court, but I see no reason to differ from the conclusions arrived at in those cases. I would add that *Stanley* v. *Powell* (45) was a case not of an accident on the highway. It was a case where the defendant had fired at a pheasant and injured the plaintiff, who was engaged as a carrier of game for the party. It would be strange that Denman, J., should have cited the authority of Bramwell, B., in *Holmes* v. *Mather* (46) if he had thought that those observations were confined to the case of accidents on the highway.

For these reasons I think that the defendants are entitled to succeed and that the action should have been dismissed.

SINGLETON, L.J. [after referring to the facts]: It is clear that the first party at fault was the National Coal Board. They or their predecessors had a cable in someone else's land. They called as a witness in this case the clerk of the works of Glamorgan County Council, who said that he knew nothing of this cable; and no one in the county council apparently did, so far as the evidence disclosed. The trespassers in the first instance were, therefore, the owners of the cable. The county council, I take it, were entitled to say to them at any time: "This cable "is on our land; true, we did not know anything about it, but "you had no right to have it on our land; you have not our per"mission; take it away". I suppose that that might have led to negotiations; but it is a surprising thing to find in these days that an electric cable serving a colliery undertaking was put through land of a county council without their having knowledge of it.

When the excavator belonging to the second defendants damaged the concrete above the cable, the first defendants knew of the damage, and the clerk of the works of the county council

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(44) Hob. 134.
(45) [1891] 1 Q. B. 86.
(46) L. R. 10 Ex. 261.

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knew. He went and saw it. Quite a few people knew; but no one thought it necessary to tell the owners of the cable that this had happened. How that could be overlooked by a responsible clerk of the works I find it difficult to understand. I should have thought that any responsible individual, knowing that there had been damage to the casing of an electric cable, would have taken care to see that the owners knew, so that they could consider the question of repairs there and then. If that course had been taken, this action need never have been brought. The clerk of the works should have reported to his superior. I am not sure whether he did; but no report went from the county council to the National Coal Board. In that sense, the county council are at fault: they ought to have known that there was an electric cable in the land which they asked the defendants to excavate for them; and later, when their clerk of the works knew that the cable or the casing of the cable had been touched by the excavator, they ought to have reported that fact. So far, therefore, we have the National Coal Board at fault, because their cable is in someone else's land, and the county council at fault, for the two reasons which I have given.

What is the position of the defendants in this action? Neither of them knew that the cable was there. They had every reason to assume that there was no obstruction other than anything shown on their plan, and this cable was not shown on their plan. Therefore, up to this stage one has both defendants without fault, each of them following the course which an ordinary contractor in such circumstances would follow. The action was brought against both defendants, alleging negligence against them and alleging that they were guilty of trespass.

I have appreciated to the full Mr. Lloyd-Jones' argument that the judge ought to have found that there was negligence, in that some fifty yards away from the site of the alleged trespass there was a pylon and another some 400 yards from that and, therefore, it might have been anticipated that there would be cables, or that there would be a cable under the land; but, having regard to the judge's finding, I do not think that there is any substance in that. The plan was given to the contractors for a purpose, and when they were dealing with a responsible body like the county council they were entitled to rely upon the plan. I agree with the judge's finding upon that issue.

I did think at one time that the plaintiffs might make a case on that which was called the second head of negligence; that,

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after this accident had occurred, the defendants ought to have reported the damage; but I am inclined to think that the man who was using the excavator which did the damage performed his duty in reporting it to the clerk of the works, the servant of the county council. He did not know whose the cable was. However, I express no final opinion on that, for the point has not been argued. The question was raised in the court below whether that kind of negligence was covered by the pleading in this case. It seems to have been accepted that it was not so covered, and it is not open to Mr. Lloyd-Jones to seek to argue it in this court; but I regard it as of the greatest importance that any contractor who strikes a cable should let it be known, so that information will reach the owners of the cable, who in turn may be able to avoid much damage or possibly to avoid a serious accident. So much for the question of negligence.

The argument before this court has been almost wholly on trespass. I draw attention to *Holmes* v. *Mather* (47) and *Stanley* v. *Powell* (48), where Denman, J., having referred to some of the earlier authorities, said (49): "The next case in order "of date relied upon for the plaintiff was *Weaver* v. *Ward* (50), "decided in 1607. There is no doubt that that case contains "dicta which per se would be in favour of the plaintiff, but it "also contains the following summing up of the law applicable "to cases of unintentional injury by acts which are prima facie "trespasses: 'Therefore, no man shall be excused of a trespass "' . . . except it may be judged utterly without his fault'". Later (51), Denman, J., said: "All the cases to which I have "referred"—and I think that this judgment of Denman, J., does most admirably review all the old authorities—"were before "the Court of Exchequer in 1875, in the case of *Holmes* v. "*Mather* (52), and Bramwell, B., in giving judgment in that "case, dealt with them thus: 'As to the cases cited, most of "'them are really decisions on the form of action, whether case "'or trespass. The result of them is this, and it is intelligible "'enough: if the act that does an injury is an act of direct force "'vi et armis, trespass is the proper remedy (if there is any "'remedy), where the act is wrongful either as being wilful or as "'being the result of negligence. Where the act is not wrongful "'for either of these reasons, no action is maintainable, though

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(47) L. R. 10 Ex. 261.

(48) [1891] 1 Q. B. 86.

(49) Ibid. 89.

(50) Hob. 134.

(51) [1891] 1 Q. B. 86, 92.

(52) L. R. 10 Ex. 261.

" 'trespass would be the proper form of action if it were wrongful. " 'That is the effect of the decisions' ".

The cable was in land of Glamorgan County Council. The county council employed the defendants to make a trench. They gave them a plan. The cable was not shown on that plan. The county council did not know of the cable. There is no evidence whatever to show that the plaintiffs or their predecessors had any licence or permission to put that cable in the place in which it was put. As I have said, prima facie the cable is there wrongfully. If someone puts his car in my garage, I am entitled to remove it. If I do so, I do not commit a trespass, nor does anyone whom I employ to remove it. I am entitled to dig a hole in my land. If someone, without permission or without my knowledge, has put something on my land and I accidentally remove it, that is not a trespass: he had no right to put it there.

The defendants, in my view, are utterly without fault. That cannot be said of the plaintiffs; nor can it be said of the county council; and, following the views of the judges of days gone by, to whose opinions I have referred, I think that in these circumstances this court ought to hold that, where the plaintiffs are at fault and the defendants are free from fault in that they have only done that which they were asked by the owner of the land to do, there is in fact no trespass by them.

I have had some doubt upon one matter. The trial judge said: "There is no evidence and no suggestion that the plaintiffs "own this land. In fact Glamorgan County Council own it". He went on to say: "This ownership was proved by a witness "from the staff of that council, called on behalf of the first "defendants. Before the evidence was given, Mr. Lloyd-Jones, "for the plaintiffs, objected to it. He thought it was being led "to lay the foundation for an argument on behalf of the first "defendants of the very kind that I am now considering, and he "complained that such a defence had not been adequately "pleaded. I would probably have upheld this objection, but, "before I was called upon to rule on it, Mr. Meurig Evans, on "behalf of the first defendants, said that he did not intend to "argue that the cable was laid on another person's land without "permission and, therefore, that the plaintiffs could not suffer "a trespass to it. On this, the objection was withdrawn. Mr. "Pennant, for the second defendants, was not asked for, and did "not give, a similar assurance. But, in the circumstances, he "said he was content to base the argument on the absence of

" proof by the plaintiffs that they owned the land in question or " had any right to put the cable there. And, indeed, the position " appears to be that the cable has been put without permission " on land not proved to be the plaintiffs'. In these circum- " stances, says Mr. Pennant, it has thus become part of that " land; it is, therefore, no longer a chattel and no longer the " plaintiffs' property ".

I do not think that there can have been any misunderstanding. If objection was taken by Mr. Lloyd-Jones to this evidence on the ground that the pleading was not sufficient on the part of the defendants, the pleading could have been amended. It is far better that the full facts should be before the court than that any evidence should be excluded upon a pleading point; but I do not think that he did regard Mr. Meurig Evans as making an admission which would destroy in any way the case which Mr. Sutton has built up in this court. In any event, Mr. Pennant did not make any admission, and the effective act was that of the second defendant. The plaintiffs' claim fails for the simple reason, as I think, that the facts proved do not disclose trespass on the part of either of the defendants. I agree that the appeal should be allowed.

MORRIS, L.J. I am of the same opinion. *Weaver* v. *Ward* (53), to which my Lords have referred, was decided in 1607 and has been much referred to in the later authorities. The words cited by my Lords: " Therefore, no man shall be excused " of a trespass . . . except it may be judged utterly without his " fault ", show, as Denman, J., said in *Stanley* v. *Powell* (54), that there clearly may be such cases. Illustrations of the types of such cases were given in the concluding words of the report in *Weaver* v. *Ward* (55). The words are: " As if a man by force " take my hand and strike you, or if here the defendant had said " that the plaintiff ran cross his piece when it was discharging, " or had set forth the case with the circumstances, so as it had " appeared to the court that it had been inevitable, and that the " defendant had committed no negligence to give occasion to the " hurt ".

The first of those illustrations would be a case in which the act was not in reality that of the defendant at all. The second illustration given is that " the plaintiff ran cross his piece when

(53) Hob. 134.
(54) [1891] 1 Q. B. 86.
(55) Hob. 134.

"it was discharging". That illustration may, perhaps, be comparable with the facts of this case. In my judgment, the position of the two defendants in this action must be judged on the same footing as the conduct of Glamorgan County Council would have been judged if the county council had themselves done the work on their own land, instead of employing others to do it. If somebody is lawfully digging on his own land and someone else comes and interposes an article between the spade as it is descending and the ground, so that the article is damaged, and damaged without any intention on the part of the person digging, it cannot, in my judgment, be said that the latter was guilty of a trespass. It would be a case within the illustration given in *Weaver* v. *Ward* (55). The position, in my judgment, would be no different if someone, without the permission or knowledge of the owner of the land, buried an article under the soil in a place where the owner would be perfectly entitled to dig. If he did so dig and unintentionally damaged the thing which had been buried without his knowledge or permission, it could not, in my judgment, be said that the occurrence was the fault of the owner of the land rather than the fault of the owner of the thing. Those really are the facts of this case, which, on its own facts, affords an illustration of what was referred to as an act that might be "judged utterly without his fault". There was, in my judgment, no fault at all in either of the defendants.

I agree with all the reasons given by my Lords, and that this appeal should be allowed.

Appeal allowed.

Solicitors: *Fortescue, Adshead & Guest, for Richards & Guest, Cardiff; Rhys Roberts & Co., for C. James Hardwicke & Co., Cardiff; R. S. S. Allen, for W. H. F. Barklam, Cardiff.*

C. G. M.

1951
May 25,
28, 29.

Devlin, J.

ALEXANDER *v.* RAILWAY EXECUTIVE.

[1949 A. 3051.]

Railways—Bailor and bailee—Luggage left in cloakroom—Special conditions—Breach of conditions by railway officials—Loss of luggage—Liability of Railway Executive.

The plaintiff deposited luggage at the parcels office of a railway station, paying the ordinary charges and receiving tickets as a receipt. On the tickets were printed the conditions subject to which the railway company (now the Railway Executive) accepted the deposit. By those conditions the executive were exempted from liability, inter alia, for the loss, detention, misdelivery of or damage to any articles exceeding 5*l.* in value, unless, at the time of the deposit, the true value of the articles was declared by the depositor and an excess charge paid. The company were entitled to withhold articles deposited except on production of the receipt ticket, but, on production of such evidence of ownership or authority to receive the articles as the company's servants should consider satisfactory, they might, although the ticket had not been produced, deliver the articles to the person claiming ownership or authority who must in those circumstances sign the company's form of indemnity.

At the time of the deposit the plaintiff was accompanied by a friend. Some time later the cloakroom official discovered the friend in the cloakroom removing articles from one of the plaintiff's trunks. The friend had been told by another railway official that he could enter the cloakroom. The cloakroom official, although the friend's presence in the cloakroom was contrary to the contract, allowed the friend to remove certain articles from the trunk. Subsequently the friend, although he had produced no tickets, was allowed to take possession of the rest of the deposited goods on his statement to the cloakroom official that he had authority from the plaintiff to do so and on his signing a form of indemnity. In fact he had no such authority, and he appropriated the goods.

On a claim by the plaintiff against the executive for damages for his loss:—

Held, that an essential part of the company's duty was to take care of the deposited goods; that they had committed a fundamental breach of the contract of bailment in allowing an unauthorized person to have access to the goods and to break open a depositor's cases and take articles away; that that fundamental breach brought the contract of bailment to an end so that thereafter the executive could not rely on the conditions of the contract which had been inserted for their protection; and that accordingly the executive were liable to the plaintiff in damages.

Semble, protection of a railway company as bailees from the consequences of "misdelivery" of an article, covers only misdelivery

[Reported by Miss E. Dangerfield, Barrister-at-Law.]

by mistake or inadvertence and does not extend to cover deliberate delivery to the wrong person.

North Central Wagon and Finance Company Ld. v. *Graham* [1950] 2 K. B. 7, applied.

ACTION.

In August, 1948, the plaintiff, Alexander, was touring Cornwall with a company of performers. On August 21 he and a performer called Colmar (who under the stage name of "Billy "Collins" co-operated in some of Alexander's acts or turns) left the company (then at Launceston) owing to a difference of opinion with the manager. Alexander had a considerable amount of equipment which he took round with him, including three specially designed steel trunks which he used in an act called an "escape illusion". On August 22 Alexander and Colmar took this luggage to Launceston railway station and Alexander inquired whether he could deposit it in the cloakroom. All the luggage belonged to him, except for a few articles of trifling value which belonged to Colmar. The parcels clerk was not on duty that morning (being a Sunday), but either the booking clerk or the signalman told Alexander that he could leave the articles in the waiting-room as the parcels room was not large and the station not very busy. Alexander and Colmar then repacked the packages in the waiting-room and Alexander locked all except one of the trunks and kept the keys. The packages were labelled with Alexander's name though apparently one was also labelled "Billy "Collins".

Alexander then went to the parcels office and a fivepenny ticket in respect of each of seven packages was handed to him (though subsequently changing his mind, he withdrew one package). He said that he would either collect the goods or would give instructions for them to be forwarded by rail. Alexander and Colmar then left the station, and ultimately Alexander went to London. Some weeks later Colmar apparently renewed his connexion with the show but Alexander did not.

On September 2, the parcels clerk found Colmar in the parcels office taking articles out of one of the trunks. Apparently the official who had been on duty when the luggage was deposited had allowed him to go into the parcels room, ostensibly to take away some things that belonged to him. The parcels clerk told Colmar that it was not correct for him to take things out of the packages, for, as the clerk was aware, the regulations prohibited even depositors from having access to deposited goods. Ultimately he agreed to relax the regulations and to allow Colmar to take out articles, on signing a list of what he took, but he told him that if he came again he must bring the tickets.

About a fortnight later, Colmar telephoned the station, spoke to the parcels clerk and inquired if he had received the tickets from Alexander. The parcels clerk said he had not. Colmar said he had heard from Alexander that the tickets had been sent on (either saying or conveying the impression that Alexander had written to this effect) but he was not sure whether they had been sent to him or to the station, and that if they had not arrived they were probably lost in the post.

Subsequently he phoned again and asked whether the tickets had arrived and then inquired what he must do to get the articles back if the tickets were lost. The parcels clerk said that if he paid the excess deposit money and signed an indemnity, it would be in order for him to have the goods.

On September 25, Colmar paid the excess deposit money (1*l*. 16*s*.), opened all the boxes and transferred some of the things into one of the steel trunks (telling the clerk that he had a show on and wanted to separate his belongings from Alexander's). He signed an indemnity form in respect of all six boxes, redeposited five, for which he received new tickets, and went away with the sixth on a train to Liverpool. On October 19, he wrote from Liverpool enclosing the five tickets, and on his instructions the luggage was forwarded to Rochdale station, where he collected it and paid the costs involved.

Subsequently Colmar was prosecuted for stealing the luggage. He admitted the offence and some of the property was recovered, though in a damaged state.

Alexander brought an action against the Railway Executive claiming damages for the loss of the luggage which was not recovered and for the damage to other articles.

Laski, K.C., and *Lloyd-Davies* for the plaintiff.

Montague Berryman, K.C., and *W. G. Wingate* for the executive.

The arguments appear sufficiently from the judgment.

DEVLIN, J. [referred to the facts and to the evidence, saying that he preferred that of the defendants, and continued]: The question which I have to determine is whether there is any liability on the defendants, the Railway Executive. Prima facie, they are bailees of the goods and, prima facie, the liability of a bailee is to restore the goods to the bailor in the condition in which they were when deposited; and that the executive have failed to do. They base their defence on two conditions which they submit formed part of the contract of bailment and excused them from liability. These conditions were contained in very small print on the cloakroom ticket itself and were also contained upon a large notice exhibited in the waiting-room and in the parcels office.

The executive rely, first, upon condition 2 (*a*), which provides: "The company shall not be liable for loss, misdelivery or detention of, or damage to, any articles or property, which separately or in aggregate exceed the value of 5*l*., unless at the time of deposit the true value and nature thereof shall have been declared by the depositor, and 1*d*. per 1*l*. sterling of the declared value paid for each day, or part of a day, in addition to the ordinary cloakroom charges".

It is not disputed that these articles exceeded the value of 5*l*. I find that their true value was never declared and the 1*d*. per 1*l*. sterling was certainly not paid. Accordingly, the executive say that they are not liable for loss, misdelivery or detention, and claim that what happened in this case was a loss or misdelivery.

Secondly, the executive rely on condition 3, which provides: "The company shall be entitled to withhold the articles or property deposited except on production of the ticket issued in respect thereof. The company may deliver such articles or property to—(*a*) any person producing the ticket, or (*b*) any person who fails to produce the ticket, upon such evidence of the loss of the ticket, and of ownership or authority to receive the articles or property, as the company's servants may consider satisfactory, in which case the company's form of indemnity must be signed by the person to whom the articles or property are delivered. The delivery of the articles or property shall acquit the company from all further claims in respect thereof".

On that clause the executive contend that they delivered the articles to Colmar, he being a person who failed to produce the ticket, on evidence of the loss of the ticket and of ownership and authority which was satisfactory to their servant concerned with the matter; and, accordingly, that delivery acquitted the company from all further claims in respect thereof.

Condition 4 provided: "Depositors are not permitted access to any article deposited".

The first answer which the plaintiff makes is on the facts: he says that there was a special contract between him and the servants of the executive which excluded the conditions or excluded the exceptions or constituted a misrepresentation about the nature of the exceptions, disentitling the executive from now relying on them. That submission necessarily fails, since I reject the evidence of the plaintiff, which is the basis of it.

The plaintiff's next answer is that he is not bound by the special conditions because the executive did not do what was reasonably necessary to bring them to his notice. It is accepted by Mr. Berryman that the executive must do what is reasonably necessary to bring the conditions to the notice of the depositor, but it is said that the executive did bring them to the plaintiff's notice. That is an issue of fact. The conditions are printed on the tickets themselves, but in print so small as to be almost illegible; but there are also printed largely and legibly on the tickets, the words "charges and conditions", and "articles or "property received in the company's cloakroom subject to "charges and conditions", which puts anybody on notice that there are charges and conditions. Mr. Berryman relies on that. Also, there was at the material time, a large and legible bill, showing what the charges and conditions were, on the wall of the waiting-room immediately above the place where the articles were originally deposited. A similar bill was exhibited in the parcels office.

I think that those two notices, coupled with what was on the ticket itself, were enough to bring the conditions to the notice of the plaintiff and to make it reasonably clear that the deposit was received subject to those conditions. After all, most people nowadays know that railway companies have conditions subject to which they take articles into their cloakrooms. The plaintiff concedes that he knew that. He admits that he knew that there would be conditions, and I think that sufficient notice was given if he cared to inquire or to read for himself what those conditions were. Accordingly that answer fails.

The next argument which the plaintiff advances is that there was a breach of the terms of the bailment on September 2, which disentitled the defendants from relying thereafter upon the exceptions in their contract, and, indeed, put an end to the contract of bailment. Para. 7 of the statement of claim alleges that in breach of the agreement the executive "on or about "September 1, 1948, allowed one William George Colmar without "the knowledge or authority of the plaintiff and without any "possible right in the said Colmar so to do to enter the said "parcels office, break open the said packages, extract articles "therefrom, and finally remove from the said parcels office and "take into his possession the said articles and one of the said "packages".

Para. 3 of the reply states: "The plaintiff will contend that "the defendants can rely upon the said conditions provided that "and so long as the defendants themselves are not in breach of "the said conditions". By para. 4 it was pleaded: "The "defendants are in breach of the said conditions in that they "wrongfully and in breach of condition 4 allowed the said Colmar "to have access in the manner set forth in para. 7 of the statement of claim and the particulars furnished thereunder to the "said six packages".

The plaintiff alleges that that is a fundamental breach of the contract which goes to the root of the matter and determines the bailment. This sort of point has been considered in a number of cases which, though rather different in their facts, are comprehended within the same principle. The well-known case of *Lilley* v. *Doubleday* (1) concerns bailments and the question whether exceptions to a contract apply or do not apply when the bailed articles are moved to an unauthorized place. Cases such as *Hain Steamship Co. Ld.* v. *Tate & Lyle Ld.* (2) concern fundamental breaches of a contract of affreightment resulting from a deviation from the contract voyage and the effect of such breaches on the exceptions contained in the contract of affreightment.

Mr. Lloyd-Davies relied on the recent decision, *North Central Wagon and Finance Co. Ld.* v. *Graham* (3), and particularly on this passage in Cohen, L.J.'s judgment (4): "I must further "point out that the hirer, in instructing the defendant to sell, "and in selling, the car, has committed a breach of the contract "which goes to the root of it. In those circumstances the "following passage in Halsbury's Laws of England (2nd ed., "vol. 1, p. 736) seems in point: 'The act of the bailee in doing "'something inconsistent with the terms of the contract ter"'minates the bailment, causing the possessory title to revert to "'the bailor and entitling him to maintain an action of trover'. "That view is stated in somewhat similar language in the "following passage in Pollock and Wright on Possession in the

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(1) (1881) 7 Q. B. D. 510.

(2) (1936) 155 L. T. 177; 52 T. L. R. 617.

(3) [1950] 2 K. B. 7.

(4) Ibid. 15.

"Common Law (at p. 132): 'Any act or disposition which is "'wholly repugnant to or as it were an absolute disclaimer of the "'holding as bailee revests the bailor's right to possession, and "'therefore also his immediate right to maintain trover or detinue "'even where the bailment is for a term or is otherwise not "'revocable at will, and so a fortiori in a bailment determinable "'at will'. The authority cited for both those passages is "*Fenn* v. *Bittleston* (5), the relevant passage occurring in the "judgment of Parke, B.". Cohen, L.J., then said that those passages were a correct statement of the law.

Asquith, L.J., said substantially the same (6): in effect, that, as a general principle of law, it was right to say that a bailee who comported himself in a manner utterly repugnant to the terms of the bailment terminated the bailment and thereupon the right to possession revested in the bailor.

These principles are clearly laid down. The difficulty always is to see how they apply to particular facts; and their application here has not been fully explored in argument by either party, for it is almost impossible for counsel in a court of first instance to elaborate detailed legal submissions before the facts have been ascertained. It is, however, my duty to apply the principles to the facts which I have found. I must, therefore, decide first, whether there was a breach of contract on September 2, secondly, whether that was a breach of a fundamental term, and, thirdly, what would be the legal consequences of such a breach.

I think it is hardly denied that there has been a breach of contract. Obviously there is a duty on a bailee to take care of the bailed goods; that means, to keep them safe from interference by third parties. Accordingly, when the company's servants allowed Colmar to enter the parcels room and to open at least one of the trunks and have access to the articles there, they were breaking an essential term of the bailment and one which was plainly implied in the contract between the parties. That was a breach quite apart from the subsequent delivery of the five articles. Whether, when the five trunks were sent, there was a misdelivery coming within one of the exceptions, it is unnecessary to determine because before they were sent there had been a breach of contract when Colmar was allowed access to the cloakroom. That breach the defendants do not, I think, seek to justify by reference to any of the protecting conditions in the contract.

Was that, then, a fundamental breach of contract? Mr.

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(5) (1851) 7 Ex. 152, 159.

(6) [1950] 2 K. B. 7, 11.

Berryman has submitted that it was not a fundamental breach within the sort of principle indicated in the cases I have mentioned. On consideration I think, however, that it was. It is clear that the duty to take care is an essential part of the duty of a bailee, and the importance to be attached to unauthorized persons not being given access to articles deposited in a cloakroom can hardly be over-emphasized. The view that the executive themselves take of it is shown by the specific provision in their contract that not even the depositor himself is to be entitled to have access to the articles. Still more must it be that no third person should be entitled to have access to them.

Furthermore, it appears to me that breaking open locked trunks is plainly a fundamental breach. The evidence is not entirely clear on that point, but I think, on the whole, that the inference is that on September 2 probably one of the locked articles was broken into. There is no doubt that ultimately they were all broken into. It may well be that it is sufficient to show that the bailee should have protected the trunks from being opened and interfered with whether they were locked or not.

I think that that must be said to be a fundamental breach of contract. I recollect a case decided in the Court of Appeal some years ago, in which it was held that the leaving of a delivery van untended by the driver was a fundamental breach of contract, disentitling the bailees of the goods in the van from relying upon exceptions in the contract. If that be so, then it is certainly a much greater breach of contract to allow access by unauthorized persons to articles deposited in a cloakroom.

On that view, therefore, Mr. Lloyd-Davies for the plaintiff contends that, in accordance with the passage which I have cited from *North Central Wagon and Finance Co. Ld.* v. *Graham* (7), the bailment was brought to an end. The result of that is that thereafter the executive could not rely, in relation to the other incidents when they parted with the remainder of the goods, on the terms and conditions of the contract which had been inserted for their protection.

The point may be put in another way. The ordinary law of contract, quite apart from the law of bailment, as discussed in *Hain Steamship Co.* v. *Tate & Lyle Ld.* (8), involves that, where there has been a breach of a fundamental term of a contract giving the other party the right to rescind it, then, unless and until, with full knowledge of all the facts, he elects to affirm the contract and not to rescind it, the special terms of the contract go and cannot be relied upon by the defaulting party. There is no question that the plaintiff ever knew of the circumstances in this case which entitled him to rescind or that he ever elected to affirm the contract. This point therefore succeeds and provides a good answer to the executive's reliance upon the conditions. Therefore that defence fails.

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(7) [1950] 2 K. B. 7.

(8) 155 L. T. 177; 52 T. L. R. 617.

I think, however, that I ought also to examine the conditions which have been relied on, partly because I desire to sustain the conclusion already expressed by the further conclusion that, even if the conditions were applicable, they would not, in the circumstances of this case, assist the executive, and partly because those further conditions involve findings of fact which it is necessary that I should make in case the view which I have already expressed is wrong in law.

Condition 3 is the one obviously designed to meet this sort of situation, though Mr. Berryman has contended that condition 2 is of an overriding character and quite wide enough to cover it. But condition 3 concerns the alleged loss of a ticket where a person claims to have the authority of the owner to take out the articles. The condition requires the production of "such evidence "as the executive's servants may consider satisfactory". Mr. Berryman concedes that that must mean "may reasonably con- "sider satisfactory"; that there must be reasonable grounds for the decision of the defendant's servant who was responsible. It has been contended for the plaintiff that there are no such reasonable grounds.

It may be observed that there must be evidence of two things: first, of the loss of the ticket; and, secondly, and in addition, of ownership or authority to receive the articles. The evidence on both of those points consisted solely of the uncorroborated statement of Colmar himself. It is a fair comment, made by Mr. Berryman, that, now that it is known that Colmar was a rogue and a thief, it is easy to say that the clerk ought not to have acted on his uncorroborated statement. But he was not a person who at that time appeared to have inspired the clerk with any very high degree of confidence. The latter said that Colmar was a boaster, and that he was the type of person whom he always rather distrusted.

I think, when one comes to consider whether there were any reasonable grounds entitling the clerk to act on the uncorroborated statement of Colmar, that it is necessary to test the matter, first, by considering whether the statement was inherently probable or not, and, secondly, by considering whether there was any simple form of inquiry which the clerk might have made in order to verify it.

As regards the first part, the loss of the ticket, the only statement was that the tickets had been lost in the post. That in itself is not a highly probable occurrence. It does sometimes happen, but much more frequently it is used as a convenient excuse by somebody who wants to see that some necessary document does not appear. It is not a very likely story. On the other hand, it is fair to say that Colmar's story was supported in the mind of the clerk by the fact that Colmar was known to be associated with the plaintiff: he had taken part in the original depositing, he had attended to the packing and repacking, and so on, and he had said that he was associated with the plaintiff. The statement of the clerk that he thought Colmar was almost in partnership with the plaintiff was not improbable, and one of Colmar's labels was on one of the trunks.

But there were four things which the clerk could have done to test the probability of the story. First, since Colmar had told him he had a letter from the plaintiff saying that he had sent the tickets either to Launceston railway station or to Colmar himself, it would have been very simple to ask him to produce the letter. Secondly, he was told that the tickets had been forwarded and had probably been lost on about September 15. It was surprising that Colmar took no steps, if his story was true (and the clerk should have thought it surprising), to obtain a further letter from the plaintiff. Thirdly, the clerk knew that at least one of the cases was locked, and it would be very surprising if the plaintiff had given Colmar authority to break into a case and not sent him the key. One very simple way of testing Colmar would have been to inquire whether he had obtained the key from the plaintiff. Fourthly, the fact that one case was labelled with Colmar's name, while helping the clerk in his decision to some extent, is against him in another way, for it suggests that there could have been only one case in which Colmar was interested as a result of his association with the plaintiff. Yet he was allowed to open them all.

I have come to the conclusion that there were no reasonable grounds on which the company's servant could come to the conclusion, first, that the tickets had been lost, and, secondly, that Colmar had authority to receive the goods.

The discretion given to railway officials embodied in the special conditions is sensible and the relevant clause should receive full effect. There must be many cases where members of the public lose cloakroom tickets, and I do not desire to say anything which might deter the officials of the Railway Executive from dealing with such cases in as open a way as they can under the protection which condition 3 so sensibly gives in such circumstances. At the same time one must bear in mind that, prima facie, a person who deposits articles in a cloakroom is entitled to feel that, so long as he keeps the tickets in his custody, there will be no interference with the articles. I think that the clerk erred in this case, being deceived, as doubtless has happened before, by the story of a rather plausible rogue into what I must regard as a breach of the duty imposed upon the Railway Executive. Accordingly, the defence based on that condition fails.

Mr. Berryman, however, says that, quite apart from that condition, there was a loss or misdelivery under condition 2. I do not think it is contended that there was any loss except in the sense that there was a misdelivery. Therefore the question which arises is whether a delivery to Colmar, in the circumstances of this case, can rightly be regarded as a "misdelivery" within the meaning of that word as it is used in condition 2. No doubt, if "misdelivery" means any delivery to the wrong person and includes a deliberate delivery to the wrong person, then the case is covered. It may well be true to say that in many cases that is the right meaning of the word "misdelivery" and it appears to be a dictionary meaning. There is no authority which is directly in point.

The alternative argument is that misdelivery, in its natural and ordinary meaning, conveys to the ordinary man that there has been some mistake or inadvertence. If, for example, there are two conflicting claims between A and B for bailed goods and the bailee who holds the goods weighs those claims carefully and decides that, on the whole, he ought to deliver the goods to A, and decides wrongly, I doubt whether, in the ordinary sense of the word, he would be said to have "misdelivered" to A, although he has delivered wrongly. I am disposed to think that, while in certain contexts the word "misdelivery" may bear the wide meaning, it is restricted in its more natural and popular meaning to a wrong delivery involving some form of mistake or inadvertence, and that it is intended to cover the sort of situation where a package is delivered to the wrong address by error or inadvertence, or where the wrong article is handed out over a counter or in a cloakroom. No principle is more firmly settled than that, when one is construing exceptions to the general liability of a carrier or a bailee, those exceptions are to be construed strictly, so that if a word is capable of bearing two meanings, the narrower meaning should be adopted. I think that where "misdelivery" is used in an exception designed to protect a bailee, it does not cover more, and would not be regarded by the ordinary man who read such conditions as covering more, than what might be called accidental misdelivery by mistake or error. Consequently, if a bailee in such circumstances wants to protect himself against every sort of wrongful delivery, however deliberately made, he must use clear and express terms to that end.

Accordingly, I should hold that that condition, if it applied, would not protect the defendants in this case.

For these reasons the plaintiff's claim succeeds.

Judgment for the plaintiff.

Solicitors: *Alan, Edmunds & Co.; M. H. B. Gilmour.*

SMITH *v.* BRITISH EUROPEAN AIRWAYS CORPORATION AND ANOTHER.

[1950 S. 196.]

1951
July 4, 5, 27.

Hilbery, J.

Damages—Fatal accident—Pension scheme—Sum paid on death—Action for damages—Rule in scheme excluding liability for negligence of servant in common employment—Rule void under Law Reform (Personal Injuries) Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 41)*—Action maintainable—Pension scheme not a contract of insurance—Sum paid to be deducted from damages.*

The plaintiff's husband, who was employed by British European Airways Corporation as a flight steward, was killed as the result of a collision between the aeroplane in which he was flying and one belonging to the Air Ministry, the pilots of the two machines concerned both being guilty of negligence.

By the terms of his employment with the corporation, the deceased man was required to become a member of a pension scheme. Under its provisions a member paid periodic contributions for the purpose of securing pension benefits while the contributions of the employers were to be at such rates as should be required to provide the balance of the pension benefits under the scheme and the whole of the death or accident benefits payable under it.

By rule 24 of the scheme, which came into effect on October 25, 1948, each member agreed, as a term of his employment, on behalf of himself, his executors, administrators, dependants and representatives, to look only to the benefits provided under the scheme in case of injury arising out of and in the course of his employment, whether resulting in death or not, and further agreed that neither his employers nor any of their servants should be liable to him or his representatives for any default, negligence, act or omission of the employers or their servants for which any claim might have been made under the Employers Liability Act, 1880, or under the Fatal Accidents Act, 1846, or at common law or in any way otherwise however.

The plaintiff's husband became a member of the scheme on January 1, 1949, and after his death she received a payment of 1,508*l.* as death benefit under the scheme and acknowledged that amount as being in payment of all moneys and benefits to which she was entitled under the scheme. On January 11, 1950, she issued a writ against her husband's employers and the Air Ministry claiming damages under the Fatal Accidents Act, 1846, and also under the Law Reform Miscellaneous Provisions Act, 1934, and on March 5, 1951, the defendants admitted the allegations of negligence made in the statement of claim.

By their defence, the corporation alleged, inter alia, that the plaintiff's claim was not maintainable by reason of the provisions of rule 24 of the pensions scheme. They also pleaded that, having accepted benefit under the scheme, the plaintiff was estopped from bringing the action; and, alternatively, that if she were entitled to damages, the 1,508*l.* received by her must be taken into account in assessing the amount.

The plaintiff pleaded that rule 24 was rendered void by s. 1, sub-s. 3, of the Law Reform (Personal Injuries) Act, 1948, which abolished the defence of common employment and came into operation four months before the contractual term expressed in the rule became effective on October 25, 1948. She also pleaded that the sum of 1,508*l.* received by her under the scheme was paid by virtue of a policy of insurance and could not, therefore, be taken into consideration in assessing damages under the Fatal Accidents Act, 1846.

Held, (1.) that rule 24 contained a provision in an agreement collateral to a contract of service which excluded any liability of the employers in respect of personal injuries caused to a person employed by the negligence of a person in common employment with him and was, therefore, rendered void by s. 1, sub-s. 3, of the Law Reform (Personal Injuries) Act, 1948, with the result that the plaintiff's action for damages was maintainable.

(2.) That the plaintiff was not estopped from maintaining the action by her acceptance of the payment made under the scheme.

(3.) That the sum received by the plaintiff under the scheme was not paid under a contract of insurance within the meaning of s. 1, of the Fatal Accidents (Damages) Act, 1908, but was a benefit which had accrued to the estate of the deceased man solely by reason of his death and must, therefore, be taken into account in reduction of the amount of damages which the plaintiff was entitled to recover.

ACTION.

The plaintiff, Elizabeth Smith, was the widow of John Taylor Smith, who was employed by the British European Airways Corporation as a flight steward. On February 9, 1949, the plaintiff's husband, in the ordinary course of his employment, was on a flight in an aeroplane piloted by another servant of his employers which came into collision with a plane belonging to the second defendants, the Air Ministry, with the result that the plaintiff's husband, with the other occupants of the plane in which he was flying, was killed.

The British Airways Corporation was constituted a corporation by s. 1 of the Civil Aviation Act, 1946; and by s. 20 it was provided that " the Minister shall by regulations provide for the " establishment and maintenance of one or more pension schemes " for the purpose of providing pensions and other similar benefits " in respect of the service of corporation employees of such classes " as may be specified in the regulations, and the Minister shall " by such regulations in particular provide for securing benefits " in the case of injury or death. In this section the expression " ' corporation employee ' means an employee of any of the three " corporations ". The corporations concerned were the British Overseas Airways, the British European Airways and the British South American Airways. By a Statutory Instrument (1948), No. 2361, entitled " The Airways Corporations (General Staff Pensions) Regulations, made on October 25, 1948, the Minister made certain regulations, by No. 2 of which it was ordered that there should be established and maintained by the three corporations a joint pension scheme for certain full-time employees, including those in the grade of the plaintiff's husband, and that the scheme should be in accordance with the terms of a trust deed dated October 8, 1948, and of the rules contained in Part I of the schedule to the deed. By reg. 3 of the Statutory Instrument it was enacted that, for the purpose of providing funds from which benefits under the scheme were to be paid, contributions should be paid by the three corporations and by the employees who were members of the scheme, in accordance with the provisions of the trust deed.

The trust deed was expressed to be made on October 8, 1948, between the three corporations of the one part, certain persons called the management trustees of the second part and Airways Corporations Joint Pension Fund Trustees Ld. (called the

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custodian trustees) of the third part. The following paragraphs of the trust deed were material:—

Paragraph (2): "The main object of the scheme is to provide "pension benefits on retirement and a subsidiary object is to "provide benefits in cases of injury or death for the staff of the "corporations in accordance with the rules. The scheme is not "in any sense a benevolent scheme and no benevolent or compassionate payments can be made therefrom". (3): "Each "of the corporations severally covenants with the management "trustees that it will pay or cause to be paid to the management "trustees all contributions to be contributed by it and by members in its employment in accordance with the rules". By the first part of para. (4): "The management trustees shall manage "and administer the scheme and shall have power to perform "all acts incidental or conducive to such management and "administration and the custodian trustees shall concur in and "perform all acts necessary or expedient to enable the management trustees to exercise their powers of management or any "other power or discretion vested in them accordingly and shall "deal with the fund and the income thereof as the management "trustees shall from time to time direct". Paragraph (6) (b): "The custodian trustees shall out of the income of the fund or out "of the capital thereof as the management trustees may from time "to time direct or failing direction as the custodian trustees at "their discretion think fit, provide the management trustees with "such moneys as they may require for the purpose of enabling "them to pay the pensions and other payments for the time "being chargeable against the fund or the administration or other "expenses thereof and shall in all respects facilitate as far as "their powers extend the discharge by the management trustees "of their responsibilities in the management of the fund". Paragraph (7): "No person whether a member or otherwise shall "have any claim right or interest upon to or in respect of the "fund or any contributions thereto or any interest thereon or "any such claim on or against the management trustees or the "custodian trustees or the corporations except under and in "accordance with the provisions of the trust deed and the rules".

The material rules in the schedule to the deed included the following:—Rule 3: "Membership compulsory for employees: "Except as otherwise expressly provided by these rules it shall "be a compulsory condition of service for all full-time employees "between the ages of twenty years and fifty years in the case

" of males . . . to join the scheme under the terms of these " rules . . .". Certain classes of employees, in which the plaintiff's husband was not included, were specified as being excluded from the operation of the rule.

Rule 4 (g): " Every employee as a condition of admission to " membership shall sign an application for admission containing " an undertaking in the form prescribed by the management " trustees to be bound by the trust deed and these rules. It " is a condition of membership that a birth certificate or other " evidence of age satisfactory to the management trustees shall " be produced to the secretary within six months of the date of " joining the scheme ". Rule 6 (a): " Contributions are payable " by a member for the purpose of securing pension benefits only " from the date of his admission to the scheme until the normal " retirement age or the actual retirement age if earlier at rates " which depend on the category or categories (as specified in " the first table) to which he may from time to time belong "; and (b): " The contributions of each employer shall consist of:— " (i) contributions at such rates certified by the actuary from " time to time as shall be required in addition to the contributions " payable by the members to provide the balance of the pension " benefits and the whole of the death and accident benefits of " the scheme in respect of persons becoming members at the " normal average age of entry such contributions to be payable " at such times so far as possible as the members' contributions " are paid into the fund . . .".

Rule 9 (a) related to the payment of pensions. Rule 10: " (a) In the event of the death of a member his own contributions " plus compound interest thereon at the rate of 2½ per centum " per annum to the date of death become payable together with " such amount as may be payable under either paragraph (b) " or (c) of this rule. (b) Subject to paragraph (d) of this rule in " the event of the death of a member from any cause other than " a death arising as a result and within six months of an accident " the death benefit shall be a sum equal to twice the annual pay " of the member at the date of his death (subject to a minimum " payment of 500*l.* and a maximum payment of 10,000*l.*). (c) " Subject to paragraph (d) of this rule in the event of the death " of a member arising as a result and within six months of an " accident the death benefit shall be a sum equal to four times " the annual pay of the member at the date of his death (subject " to a minimum payment of 1,000*l.* and a maximum payment

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"of 10,000*l*.) Provided that at the request of an employer the "management trustees may extend the period of six months "referred to in this paragraph by such period as they think fit "either generally or in any particular case. . . . (f) The amounts "referred to in this rule shall be payable to the legal personal "representative of the deceased member or former member".

Rule 18 prohibited the assignment of, or borrowing against, pensions or other benefits under the scheme. Rule 23: "If the "member or his personal representative shall make any claim "against an employer for compensation under the Workmen's "Compensation Acts 1925–1943 or under any law which provides "against 'contracting out' for the time being in force then the "management trustees shall be entitled to retain all moneys "payable under the scheme in respect of the same accident until "the claims so made shall have been finally disposed of where-"upon the management trustees shall be entitled before payment "of such moneys to the member or his personal representative "to deduct an amount equal to the aggregate sums received by "the member or his personal representative as a result of any "claim and to retain for the use of the employer the amount so "deducted".

Rule 24: "In consideration of the benefits provided hereunder "each member agrees with his employer as part of the terms "of his employment and undertakes for himself and for his "executors and administrators dependants and representatives "and for any person who would but for this rule become entitled "to rights against his employer as a result of the member's death "to look only to the benefits provided under the scheme in case "of injury arising out of and in the course of his employment "whether resulting in death or not and the member further "undertakes and agrees that neither his employer nor any of its "servants shall be liable to him or to his executors or adminis-"trators dependants or representatives or to any such person as "aforesaid for and in respect of any default negligence act or "omission of the employer or its servants for which any claim "might have been made either under the Employers Liability "Act 1880 or under the Fatal Accidents Act 1846 or at common "law or in any way otherwise howsoever: Provided always that "if the appropriate benefits shall not become payable to the "member or to his executors or administrators dependants or "representatives for any reason whatsoever other than any act "or omission of the member then the member and his executors "administrators dependants and representatives and any such "person as aforesaid shall be entitled to all the rights (if any) "against his employer under either the Employers Liability Act "1880 or under the Fatal Accidents Act 1846 or at common law "or in any way otherwise howsoever to which they would respectively have been entitled but for the provisions of this rule".

On December 14, 1948, the plaintiff's husband applied for admission as a member of the scheme as from January 1, 1949, and requested the management trustees to arrange with his employers to deduct his contributions to the scheme from his salary, and thereby expressly agreed with his employers and the management trustees to be bound by all the provisions of the trust deed and rules then in force. He was duly admitted and was a member of the scheme at the time of his death.

On May 18, 1949, the plaintiff received a cheque for 1,509*l.* 1*s.* as being the sum to which her husband's estate was entitled under the pension scheme. The sum in question represented four times 377*l.*, the deceased man's salary at the time of his death, namely, 1,508*l.* and returned contributions, seven weeks at 3*s.* a week, 1*l.* 1*s.* The plaintiff acknowledged the receipt of 1,509*l.* 1*s.* as being "in payment of all moneys and benefits whatsoever due to "the estate from the Management Trustees of the Airways Cor"porations Joint Pension Scheme" and in full discharge of all liability of the management to the estate of the deceased.

On January 11, 1950, the plaintiff issued the writ in the action against the British European Airways Corporation and the Air Ministry claiming damages under the Fatal Accidents Act, 1846, on behalf of herself and her son and daughter, and under the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix of her husband's estate. In her statement of claim the plaintiff alleged that her husband's death was due to the negligence of the servants of one or other or both of the defendants. On March 5, 1951, each of the defendants admitted the allegations of negligence relied on by the plaintiff, and it was subsequently agreed that the defendants should be considered as being negligent in equal degree.

The first defendants by para. 5 of their defence pleaded that by reason of rule 24 and the fact that benefits under the pension scheme amounting to 1,508*l.* had been duly paid to the plaintiff, the action was not maintainable against them. As a second special plea in bar the first defendants pleaded that by accepting the sum of 1,508*l.* paid under the scheme the plaintiff was estopped from maintaining the action.

In reply to the first plea the plaintiff alleged that by s. 1, sub-s. 3, of the Law Reform (Personal Injuries) Act, 1948, the provision in rule 24 was a contractual provision which allowed the first defendants to rely on the defence of common employment which was rendered void by the Act of 1948. The plaintiff further pleaded that the sum of 1,508*l.* was a sum paid on the death of her husband under a contract of assurance or insurance and could not, therefore, by reason of the provisions of s. 1 of the Fatal Accidents (Damages) Act, 1908, be taken into account in assessing the damages to which she was entitled under the Fatal Accidents Acts.

Lastly, the plaintiff said that in any event only one-half of the 1,508*l.* became payable by reason of the death, and the other half was money which would have come to the plaintiff in any event on her husband's death by the operation of rule 10 of the scheme, and was, therefore, only a receipt by her of an accelerated payment.

Montague Berryman, K.C., and R. T. Monier-Williams for the plaintiff.

Edmund Davies, K.C., and *Stephen Chapman* for the first defendants.

C. N. Shawcross, K.C., and *B. S. Wingate-Saul* for the second defendants.

The arguments are sufficiently indicated in the judgment.

Cur. adv. vult.

July 27. HILBERY, J., read a judgment which, after stating the facts and setting out the relevant regulations and rules of the pension scheme, referred first to the last plea of the plaintiff as set out above that only half the sum of 1,508*l.* became payable by reason of her husband's death and the other half was money which would have come to her on such death and was, therefore, only a receipt by her of an accelerated payment. His Lordship continued:—This contention is, in my view, quite untenable. In the first place, the death here did arise as a result and within six months of an accident, whether or not the claim under the Fatal Accidents Act is barred by rule 24. Even if one-half of the sum is to be treated as money forming part of the estate of the deceased at the date of his death, none the less it is well established that if the person claiming damages is put, on the death of the relative, into possession of an estate then, to that extent, there is no loss. It was not argued that the plaintiff must in any event, therefore, give credit against any damages recovered to the extent of one-half of 1,508*l.* but that, because the plaintiff only recovered an accelerated payment, no part of it was to be set off against the damages. I am unable to follow or accept the argument. I turn, therefore, to deal with the first of the two main contentions of the first defendants.

The contract term expressed in rule 24 of the pensions scheme came into force by virtue of the Statutory Instrument 1948, No. 2361, on October 25, 1948, almost four months after the Law Reform (Personal Injuries) Act, 1948, had abolished the defence of common employment. This rule, therefore, came into operation at a time when the employer was liable at law to the legal personal representative and dependants of an employee killed through the negligence of a fellow servant when acting in a common employment with the man so killed, and it excludes the employer's liability at law in terms which will include a case where a servant's executors, administrators and dependants would be entitled to claim against the employer because the death of that servant had been caused by the negligence of another servant of the employer acting in a common employment with the deceased.

Section 1, sub-s. 3, of the Law Reform (Personal Injuries) Act, 1948, is in these terms: "Any provision contained in a con-"tract of service or apprenticeship, or in an agreement collateral "thereto (including a contract or agreement entered into before "the commencement of this Act), shall be void in so far as it "would have the effect of excluding or limiting any liability of "the employer in respect of personal injuries caused to the "person employed or apprenticed by the negligence of persons "in common employment with him". These terms are so wide that it is difficult to see why its effect is not, as the plaintiff contends, to render void this collateral provision in rule 24, in so far as that rule has the effect in a particular case of excluding the liability of the employer in respect of the personal injuries caused to the person employed, by the negligence of a person in common employment with him. The kind of collateral provision which the sub-section in question renders to some extent void is not confined to such a provision in a contract of service. It expressly avoids such a provision if it occurs in an agreement collateral to a contract of service. The pension scheme in question is an agreement, and it is an agreement to which those who enter the employment of any one of the three employers named in the scheme after the scheme has come into operation are bound to become parties. For such full-time employees, entry into the scheme is made a compulsory condition of service under rule 3. It is an agreement, and an agreement separate from, but subordinate to, and linked to, the actual contract of service and it exists side by side with that contract. It has, therefore, all the characteristics of a collateral contract, and, in my view, must be regarded as such. Rule 24 is then a provision in an agreement collateral to a contract of service, and the only question that remains on this part of the case is whether it is a provision one of the effects of which is to exclude or to limit the liability of the employer in respect of personal injuries caused to the person employed by the negligence of persons in common employment with him.

It is conceded in this case that the deceased man was killed partly by the negligence of a person in common employment with him at the time, namely, the pilot of the plane in which the deceased was the steward, on a date and in circumstances such as would, but for the rule, entitle his dependants to recover under the Fatal Accidents Act. That this contractual rule would have the effect of excluding the employer's liability for that fellow servant's negligence is contended by the defendants and conceded by the plaintiff. In other words, it is acknowledged to be a provision in an agreement collateral to a contract of service which would have the effect of excluding the liability of the employer in respect of the accident to the deceased man which was caused by the negligence of a person in common employment with him. To the extent to which it has this effect, s. 1, sub-s. 3, of the Law Reform (Personal Injuries) Act, 1948, enacts that it shall be void, and I therefore so decide. The first defendants' plea of rule 24 in bar of the claim consequently fails.

The second special plea of the first defendants in answer to the claim was that, by accepting the 1,508*l.*—I disregard the 1*l.*—which the plaintiff undoubtedly accepted under the scheme, she was estopped from maintaining this action. The first thing to be observed is that the infant dependants, on whose behalf this claim is partly brought, cannot be estopped by the conduct of their mother. It was argued that the plaintiff was, however, estopped because, in taking the money payable under and in accordance with the rules of the scheme, she had done so on the basis and representation that she was bound by those rules and that her employers had altered their position to their detriment in consequence of the plaintiff so acting. This argument, however, breaks down at every point. The plaintiff, by acting as she did, made no representation to, and accepted no money from, the deceased man's employers, the first defendants. If her conduct amounted to a representation that she abided by the rules, that representation was made to the managing trustees of the scheme. Furthermore, the employers have not been shown by the evidence to have altered their position or to have had their position altered to their detriment or at all by this alleged representation by conduct of the plaintiff. It was said on their behalf that, under the scheme, they and the other employers who are parties to this scheme alone provide, under rule 9 (b), the money for the fund out of which this 1,508*l*. taken by the plaintiff was paid. That is true, but those contributions are the actuarially assessed contributions required to cover the risk, inter alia, of death by accident of any employee in the scheme, and it was not proved that the contribution of these employers to that particular fund had been, or would be, increased by reason of the payment out of the fund of this sum to the plaintiff. The plea of estoppel, therefore, also fails.

The only question which remains is what is the proper amount of damages under the Fatal Accidents Act, 1846, to be awarded according to the decided law governing such a claim. Here, one more difficulty arises, for if, as the defendants contend, the sum of 1,508*l*. which the plaintiff has received as administratrix of the deceased man's estate is a benefit which has accrued to the deceased's estate solely by reason of his death, it must be set against the financial loss to his dependants which has resulted from his death.

In *Bradburn* v. *Great Western Railway Co.* (1) Bramwell, B., said: "The statute had laid down no rule as to the mode of "calculating the damages to be given in respect of the right of "action which it created. The rule was first laid down in this "court, and that rule was, that the damages were to be a "compensation to the family of the deceased equivalent to the "pecuniary benefits which they might have reasonably expected "from the continuance of his life. If, therefore, the person "claiming damages was put by the death of his relative into "possession of a large estate, there was no loss; he was the

(1) (1874) L. R. 10 Ex. 1, 3.

"gainer by the event; and similarly, whatever comes into the "possession of the family who have suffered by the death of their "relative by reason of his death must be taken into account". Those words express what has been the principle applied ever since in calculating the damages to be given under the Fatal Accidents Act.

The argument for the plaintiff is that it is not such a benefit because it is a sum paid under a contract of assurance or insurance and, as such, is expressly excluded from consideration in the assessment of damages by the Fatal Accidents (Damages) Act, 1908. By s. 1 of that Act it was enacted that, in assessing damages under these Acts, there should not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of that Act. Unless, therefore, this sum was a sum payable on the death of the deceased under a contract of assurance or insurance within the meaning of those words, as used in the Act of 1908, it must be taken into account in diminution of the damages which are recoverable here under the Fatal Accidents Act, since the family has come into the present possession and benefit of that sum as part of his estate by reason of his death. If the words of the Act of 1908 are given their ordinary meaning —that is to say, taken to be intended to refer to what, in everyday affairs, would be regarded as a contract of assurance or insurance—plainly membership of a pension scheme, though it involves an agreement to be bound by rules and to that extent is contractual, is not such a contract. The Act was creating an exception to what was otherwise the law, and ought not, therefore, to be given any wider interpretation than the ordinary meaning of the language would convey, unless such wider meaning is necessary to give effect to the intention of the Act as a whole. It is not necessary, because the Act is dealing with two well-known and recognized types of contract. But it is argued that a member of the scheme enters into a contract, that a contract of insurance does not need, with certain exceptions which do not apply, to be expressed in a policy or any particular form, that this contractual scheme involved the member in a contractual obligation to make periodical payments in return for a right to receive at an uncertain date or on the happening of an uncertain event a money benefit, and therefore, it was contended, all the essentials of a contract of insurance were present.

In the first place, it is to be observed that under this scheme

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the deceased man, as an employee member, was not making, and never contracted to make, periodical payments in return for an undertaking on the part of the management trustees of the scheme to pay this death benefit. By being a member of the scheme, he incidentally obtained this benefit, but he did not derive it from the periodical payments which he made. His periodical payments were the amount taken from his pay which, on an actuarial calculation, were necessary to provide the funds for the various scales of pensions for which he might qualify. Only the employers had to contribute the moneys required to provide the whole of the death and accident benefits of the scheme under rule 6 (b). All contributory pension schemes may be said to be contractual and to involve periodical payments by members, generally by deductions from pay, as here, yet the courts have not yet held that the proceeds of membership of such schemes, when received by the widow or into the estate of the deceased by reason of the death of the member, should be disregarded in assessing the damages recoverable under the Fatal Accidents Act.

In *Baker* v. *Dalgleish* (2) the court held that the value of the probability of the continuance of a voluntary pension paid to a widow of a deceased petty officer in the Royal Navy paid under the regulations of the Navy Pay and Pensions Order, 1920, No. 1021, must be taken into account in assessing the damages recoverable by such a widow under the Fatal Accidents Act. "As "the question is", said Scrutton, L.J., in that case (2), "what "is her pecuniary loss by the death, any pecuniary advantage she "has received from the death must be set off against her probable "loss. This is clear if she receives such advantage as of legal "right. Thus a sum received by the claimant under an accident "insurance policy must have been deducted until the passing of "the statute of 1908; in the case of a sum received under a life "policy the premiums the deceased would have had to pay if "he lived must have been taken into account in assessing his "probable income, though the sum paid under the policy need "not be deducted: *Grand Trunk Railway Co. of Canada* v. *Jen-"nings* (3). And where the claimant received in consequence of "the death under a settlement (*Pym* v. *Great Northern Railway* "*Co.* (4)), or under a partnership agreement, pecuniary benefit "from the death, such benefit must be taken into account. In "my view the same principle applies to voluntary benefits

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(2) [1922] 1 K. B. 361, 363.

(3) (1888) 13 App. Cas. 800.

(4) (1863) 4 B. & S. 396.

"conferred in consequence of the death. Just as in assessing "the loss by the death the probability of voluntary contribution "destroyed by the death of the contributor may be included to "swell the claim, so the probability of voluntary contribution "bestowed in consequence of the death may be used to reduce "the claim by showing what loss the claimant has in fact sustained by the death. Less weight will be given to voluntary "contributions than to those made under legal obligation, just "because they are voluntary. Still less weight will be given "to voluntary contributions in instalments, because they are "obviously terminable; and still less weight if the contributor "announces he will reduce his contribution by the amount of "compensation obtained from a wrongdoer who causes the "death".

In that case it is true that the court was not dealing with a contributory pension scheme, but in *Lory* v. *Great Western Railway Co.* (5), where the deceased man had been a member of the Police Pensions Fund and his widow, who was claiming damages under the Fatal Accidents Acts by reason of her husband's death, was in receipt of a pension from that fund, the court was dealing with a pecuniary benefit derived from a contributory pension scheme fund and took into account the pecuniary benefit which the pension represented in assessing those damages. After pointing out that the widow's pension might cease in certain events, the judge stated his view that it was clear that subject to those contingencies and possibilities the pension had to be taken into account in arriving at the amount of the damages. The pension moneys were not, he said, sums in the nature of insurance moneys.

These cases are not on all fours with the present case, but they support the view which I take in this case, namely, that the 1,508*l*. received from the management trustees of the pension fund in question was not money paid or payable on the death of the deceased under any contract of assurance or insurance within the meaning of the Fatal Accidents (Damages) Act, 1908. It has come into present enjoyment through the death of the deceased as part of his estate and must be taken into account in arriving at the amount of the damages which it is proper to award.

[Hilbery, J., assessed the gross amount of damages at 3,900*l*. and deducting therefrom 1,508*l*. paid under the pension scheme and 100*l*. for which he gave judgment for loss of expectation of life under the Law Reform (Miscellaneous Provisions) Act, 1934, of the balance of 2,292*l.* remaining, he awarded 2,030*l.* to the plaintiff, 62*l.* to her son, and 200*l.* to her daughter. As it was agreed that the degree of negligence as between the defendants was equal, each of them would pay half the damages and half the costs.]

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(5) [1942] 1 All E. R. 230.

Judgment for the plaintiff.

Solicitors: *Shaen, Roscoe & Co.; L. Bingham & Co.; Treasury Solicitor.*

P. B. D.

ABBOTT *v.* THE LONDON COUNTY COUNCIL.

[1949 A. 2115.]

C. A.

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Singleton and Morris, L.JJ., and Lloyd-Jacob, J.

Local government—Statutory increase of pension—Payable by a local authority solely in respect of Local Government service—Employee of London County Council contributing to superannuation fund—Compulsory transfer to London Passenger Transport Board—Retirement on medical grounds—Superannuation allowance obtained from Council's fund—Allowance unaffected by Pensions (Increase) Acts, 1944 *and* 1947 (7 *&* 8 *Geo.* 6, *c.* 21 *and* 10 *&* 11 *Geo.* 6, *c.* 7)*—London Passenger Transport Act,* 1933 (23 *Geo.* 5, *c.* 14), *s.* 73, *sub-s.* 3, *s.* 80, *sub-ss.* 9, 10 *and* 11.

The claimant, a woman checker in the tramways department of the London County Council, who contributed to their Superannuation and Provident Fund was compulsorily transferred to the service of the London Passenger Transport Board, as from July 1, 1933, where she became a traffic clerk, grade 2. She was certified as permanently unfit on medical grounds and left the service of the Board on August 3, 1938, when she became entitled to receive a superannuation allowance from the Council's fund of 86*l.* 16*s.* 8*d.* a year. Had the claimant continued in the service of the London County Council down to the date of her enforced retirement, by virtue of the Pensions (Increase) Act, 1944, she would have been entitled to a yearly increase of her superannuation allowance of 21*l.* 14*s.* 2*d.* as from January 1, 1944, since her allowance would have become payable by a local authority "solely in "respect of local government service" within the meaning of Sch. I to that Act and similarly to an increase of 30*l.* a year, as from December 1, 1946, by virtue of the Pensions (Increase) Act, 1947. She did not contend that she was entitled to the increased allowances, which she now claimed, if the provisions of the Pensions (Increase) Acts, 1944 and 1947 only were regarded, since her allowance was not payable "solely in respect of local government service"; but she claimed to be entitled to them by reason of the provisions of s. 80, of the London Passenger Transport Act, 1933.

It was provided by s. 73, sub-s. 3, of the London Passenger Transport Act, 1933, "that no existing . . . servant so transferred "shall, without his consent, be, by reason of such transfer, in "any worse position, in respect to the conditions of his service as "a whole, as compared with the conditions of service formerly "obtaining with respect to him . . ." and by sub-s. 10, of s. 80 of that Act:— "Where any person who continues to be a member "of a local authority's Fund ceases to be an officer or servant of "the Board, the provisions of any such enactment, scheme, rule or "regulation as aforesaid ('any enactment or scheme or any rule or "'regulation by which that fund is regulated', see sub-s. 9) which "would have been applicable upon his ceasing to be an officer, or "servant of the authority shall apply as if he had remained an "officer or servant of the authority, and had ceased to be such an "officer or servant at the time at which, and in circumstances "similar to those in which he ceased to be an officer or servant of "the Board".

Held, that the claimant was not entitled to these increases of her superannuation allowance, since the Pensions (Increase) Acts, 1944 and 1947, were not enactments by which the Superannuation and Provident Fund of the London County Council was regulated.

Per Morris, L.J. Further, sub-s. 10, of s. 80, of the Act of 1933 related to the time when a servant of the Council who had been transferred to the service of the Board, ceased to be a servant of the Board. Upon the claimant thus ceasing to be a servant of the Board on August 3, 1938, the effect of the sub-section was that she was to be treated as though she had remained in the service of the London County Council and as though she had retired from the service of the Council on that date through ill-health.

Any enactment or scheme, rule or regulation by which the Fund was then regulated applied to decide her rights, but they were to be decided on the basis postulated.

Per Lloyd-Jacob, J. If at the cessation of the claimant's employment with the Board, an enactment had in fact regulated the Council's Superannuation and Provident Fund, in the sense of determining the appropriate pension which would be payable to her, any subsequent amendment or modification of that enactment would apply to persons, such as the claimant, who were already receiving payment, as much as to those whose pension rights had not yet accrued.

Decision of McNair, J., ante, 127, affirmed.

APPEAL from McNair, J. (1).

The claimant entered the service of the respondents, the London County Council, on August 23, 1909. She was a woman checker in the tramways department and she contributed to the Superannuation and Provident Fund of the London County Council. Whilst in that service on July 1, 1933, she was compulsorily transferred to the service of the London Passenger Transport Board, where she became a traffic clerk, grade 2. Having become ill, she was certified as permanently unfit on medical grounds and left the service of the board on August 3, 1938, and the board so informed the council. She then became entitled to receive a superannuation allowance from the London County Council's fund which was 86*l*. 16*s*. 8*d*. a year.

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(1) Ante, 127.

Had the council retained their tramway undertaking, and if, as a result, the claimant had continued in their service down to the date of her enforced retirement, it appeared that, by the Pensions (Increase) Act, 1944, she would have been entitled to a yearly increase of her superannuation allowance of 21*l*. 14*s*. 2*d*. as from January 1, 1944, since her pension would have been one payable by a local authority "solely in respect of local government service" (see the First Schedule to that Act), and similarly to an increase of 30*l*. a year as from December 1, 1946, by virtue of the Pensions (Increase) Act, 1947. These increases she now claimed by her action against the London County Council. McNair, J., gave judgment for the council, and the claimant appealed.

Nicholas and *J. D. May* for the claimant. It is clear from the terms of s. 73, sub-s. 3, of the London Passenger Transport Act, 1933, that a servant of the London County Council on July 1, 1933, who was compulsorily transferred to the service of the board should not be in any worse position than before that date in respect of the conditions of his service. The claimant remained a member of the London County Council Superannuation and Provident Fund just as if she had remained in local government service throughout the whole time. The claimant contends that although if one looks only at the Pensions (Increase) Acts, 1944 and 1947 (1), she would not be entitled to the increases granted by those Acts, since her allowance paid from the council's fund was not paid "solely in respect of local government "service", yet she is so entitled by reason of the terms of sub-ss. 9 and 10 of s. 80 of the London Passenger Transport Act, 1933 (2). See especially the concluding words of sub-s. 9: "so

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(2) London Passenger Transport Act, 1933, s. 73, sub-s. 3: "No existing officer or servant so transferred shall, without his consent, be, by reason of such transfer, in any worse position in respect to the conditions of his service as a whole as compared with the conditions of service formerly obtaining with respect to him and, in determining whether an officer or servant is, or is not, in a worse position, regard shall be had to all relevant considerations, including tenure of

"long as he remains an officer or servant of the Board continue "to be a member of that Fund and, subject to the provisions of "the three next succeeding sub-sections, while he so continues "office, remuneration, gratuities, "pension, superannuation, sick fund "and any other benefits or allowances, whether provided for himself "or for his widow, family or representatives and whether obtaining "legally or by customary practice of "the authority, company or person "under whom he held his office or "employment".

Section 80, sub-s. 9: "Any person "who, being an officer or servant of "any of the local authorities specified "in Part III of the Second Schedule "to this Act" (of which the London County Council was one) "is transferred to and becomes an officer or "servant of the Board, and who "immediately before the appointed "day was a member of any pension, "superannuation or other benefit "fund set up by that authority (in "this section referred to as 'a local "'authority's fund') may, so long as "he remains an officer or servant of "the Board, continue to be a member of that fund and, subject to the "provisions of the three next succeeding subsections, while he so "continues to be a member, the provisions of any enactment or scheme "or any rule or regulation by which "that fund is regulated shall, so far "as respects him, continue to apply "to the local authority, and he shall "be entitled to the same benefits, "rights and privileges and, subject "to the same obligations, whether "obtaining legally or by customary "practice, as he would have been "entitled or subject to if he had "remained an officer or servant of "the authority".

Sub-section 10: "Where any person who continues to be a member "of a local authority's fund ceases to "be an officer or servant of the "Board, the provisions of any such "enactment, scheme, rule or regulation as aforesaid which would have "been applicable upon his ceasing to "be an officer or servant of the "authority shall apply, as if he had "remained an officer or servant of "the authority, and had ceased to be "such an officer or servant at the "time at which, and in circumstances "similar to those in which he ceased "to be an officer or servant of the "Board".

Sub-section 11: "Where any officer "or servant of the Board continues "after the appointed day to be a "member of a local authority's fund "—(*a*) the authority may in respect "of him grant benefits, and make "payments into and out of the fund, "as if his employment by the Board "were employment by the authority".

Pensions (Increase) Act, 1944, s. 1, sub-s. 1: "Subject to the provisions "of this section, a pension specified "in the First Schedule to this Act "may, in respect of any period after "December 31, 1943, be increased by "the pension authority by an amount "calculated in accordance with the "provisions of the Second Schedule "to this Act . . .".

Sub-section 7: "Where any such "pension as is specified in Part II of "the First Schedule to this Act may "be increased under the provisions of "this section, it shall be the duty of "the pension authority to increase "the pension in accordance with "those provisions".

Section 4 of the Act enabled His Majesty by Order in Council to direct certain extensions of the provisions of s. 1.

Section 5, sub-s. 1: "Any additional expenditure incurred by "reason of the provisions of this "Act in respect of the pensions "specified in Part I of the First "Schedule to this Act shall be defrayed out of moneys provided by "Parliament".

Sub-section 2: "Where any such "pension as is specified in paragraph "1 of Part II of the First Schedule "to this Act is increased under the "provisions of this Act, the cost of "to be a member, the provisions of any enactment or scheme "or any rule or regulation by which that Fund is regulated shall, "so far as respects him, continue to apply to the local authority "and he shall be entitled to the same benefits, rights and "privileges, and subject to the same obligations . . . as he "would have been entitled or subject to if he had remained an "officer or servant of the authority". If the claimant had remained a servant of the London County Council it is conceded that she would have been entitled to these benefits, rights and privileges, namely, these increases under the Pensions (Increase) Acts, 1944 and 1947. See also the terms of sub-s. 10 of s. 80, which deal with the position where the transferred servant ceases to be a servant of the board.

McNair, J., held that the Pensions (Increase) Acts, 1944 and 1947, were not enactments by which the Superannuation and Provident Fund of the London County Council was regulated. But the operative word in the Acts of 1944 and 1947 is the verb "increased", and since the claimant's superannuation allowance must, by virtue of sub-ss. 9 and 10 of s. 80 of the London Passenger Transport Act, 1933, be deemed to be a pension payable by a local authority "solely in respect of local government "service", the enactment of the Acts of 1944 and 1947 "increased" her allowance, that is, regulated the fund.

H. E. Francis for the London County Council. Sub-section 10 of s. 80 of the London Passenger Transport Act, 1933, is dealing with the position of the claimant at a point of time, that is, when she left the service of the board. At that time the provisions of any enactment by which the council's fund was regulated, "which would have been applicable upon his ceasing to "be an officer or servant of the authority shall apply, as if he had "remained an officer or servant of the authority and had ceased "to be such an officer or servant at the time at which and in "circumstances similar to those in which he ceased to be an "officer or servant of the board". But at that time the Pensions (Increase) Acts, 1944 and 1947, were not in existence.

In any case the decision of the trial judge was right in that the Acts of 1944 and 1947 were not enactments by which the

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"the increase shall be defrayed by "the pension authority: Provided "that where the pension authority "are not the last employing authority, "the last employing authority shall "reimburse the cost of the increase to "the pension authority".

By s. 8, sub-s. 1, the expression "pension" is defined as meaning "any pension payable by way of "periodical payments", and as including "any allowance or other "benefit payable . . . by virtue of "any superannuation scheme . . .".

council's fund was regulated. That appears clearly from s. 5, sub-s. 2, of the Pensions (Increase) Act, 1944: "Where any "such pension as is specified in para. 1 of Pt. II of the First "Schedule to this Act is increased under the provisions of this "Act, the cost of the increase shall be defrayed by the pension "authority". That, in itself, is a clear indication that the increase does not arise from a regulation of the fund which is created by sums paid by the council and the beneficiary.

Nicholas replied.

Cur. adv. vult.

July 30. The following judgments were delivered:—

MORRIS, L.J. It seems manifest from the terms of s. 73, sub-s. 3, of the London Passenger Transport Act, 1933, that it was intended that an existing servant of the London County Council on July 1, 1933, should not, by reason of compulsory transfer, be in any worse position than before that date in respect of the conditions of his service. The result of the Act of 1933 was that the appellant continued to be a contributor to, or, if the language of sub-s. 9 of s. 80 of that Act is employed, "to be "a member of the London County Council Superannuation and "Provident Fund". When she became ill and was certified as permanently unfit on medical grounds, she left the service of the board on August 3, 1938, and she became entitled to receive a superannuation allowance from the London County Council Superannuation and Provident Fund. Sub-section 10 of s. 80 of the London Passenger Transport Act, 1933, applied and, by the calculation indicated in cl. 15 of the scheme made under the London County Council (General Powers) Acts, she became entitled to a superannuation allowance of 86*l*. 16*s*. 8*d*. a year.

If the London County Council had retained their tramway undertaking, and if as a result the appellant had continued in their service down to the date of her enforced retirement, it seems that the Pensions (Increase) Act, 1944, would have operated so as to increase her superannuation allowance. She would have become entitled to a yearly increase of 21*l*. 14*s*. 2*d*. as from January 1, 1944. So also would she have benefited from the Pensions (Increase) Act of 1947, and her increase in pension would as from December 1, 1946, have been 30*l*. a year. She has not received any increases, and accordingly brought this action to have her rights determined.

On the face of it, it seems that because of her compulsory transfer she is worse off in her superannuation allowance to the annual amount of 30*l*. That seems to be contrary to the intention of the Act of 1933. Relying on the concluding words of sub-s. 9 of s. 80 of the London Passenger Transport Act, 1933, the appellant contends that Parliament has enacted that she "shall be entitled to the same benefits, rights and privileges . . . "whether obtaining legally or by customary practice, as she "would have been entitled to" if she had remained a servant of the London County Council. Had she so remained she would now be receiving 30*l*. a year more. Her case is that she would have had a legal right to that increase. It is claimed, therefore, that the Act of 1933 provides that she is entitled to this right.

Paragraph 4 of the statement of claim was in the following terms: "By reason of the provisions of s. 80 of the London Passenger Transport Act, 1933, and, in particular, sub-ss. 9, 10 "and 11 thereof, the said pension is a pension payable by a local "authority solely in respect of local government service within "the meaning of para. 1 of Pt. II of the First Schedule to the "Pensions (Increase) Act, 1944, and upon the coming into force "of the Pensions (Increase) Acts, 1944 and 1947, the defendants "became empowered to make and the plaintiff became entitled "to receive increases in her said pension to the extent therein "provided for". The paragraph continued: "But the defendants deny that they have any power to grant such increases, "and have refused to grant the same or to consider her claim "for such increases made in the manner provided for by s. 3 of "the Pensions (Increase) Act, 1944".

It was not contended before us that the appellant would be entitled to an increased pension if the provisions of the Pensions (Increase) Act, 1944, alone were looked at. On such basis she would clearly not be entitled to an increase for the reason that her pension is not one payable by a local authority "solely in "respect of local government service". (See the pension specified in the First Schedule to the Act of 1944.) It is said on behalf of the appellant that her position is taken care of by the provisions of s. 80 of the Act of 1933. It, therefore, falls to be considered whether those contentions made on behalf of the appellant are right, and whether the Act of 1933 contains provisions which entitle the London County Council to pay, and the appellant to claim, an increased pension.

The provisions of sub-ss. 9, 10 and 11 of s. 80 of the London Passenger Transport Act, 1933, have been referred to. In my judgment, when sub-s. 9 is looked at, it appears that it relates to the time during which a person continues to be a member of the council's fund, while remaining a servant of the board. As applicable to the facts of the present case, the provisions of sub-s. 9 relate to the position of the appellant down to August 3, 1938, and, in my judgment, the effect of sub-s. 9 is that during that period on the one hand the provisions of any enactment, scheme, rule or regulation regulating the fund continue to apply as respects her to the London County Council; and, on the other hand, she has the benefits, rights and privileges, and is also subject to the obligations, as though she had remained with the London County Council. Sub-section 10, in my judgment, relates to the time when a servant transferred to the board ceases to be a servant of the board. Applying that sub-section to the facts of this case, that sub-section relates to the position of the appellant on August 3, 1938. Upon her so ceasing to be a servant of the board she was to be treated as though she had remained with the London County Council and as though she had retired on August 3, 1938, on account of ill-health. Any enactment, scheme, rule or regulation by which the fund is regulated applies to decide her rights, but they are to be decided on the basis postulated. Sub-section 11 is, in my judgment, really an administrative provision and deals with a servant of the board, that is to say, is dealing with the time while someone remains a servant of the board. It does not deal with someone who has ceased to be a servant of the board. For those reasons, in my judgment, upon a reading and construction of these sub-sections of s. 80, the appellant does not show that she is entitled to the increases which she claims.

But in addition to the reasons that I have just assigned based upon a consideration of those sub-sections, there are other reasons which, in my judgment, lead to the same conclusion. It has to be considered what is the meaning of the phrase "any enactment or scheme or any rule or regulation by which that fund is "regulated". The Acts of 1944 and 1947 are not schemes or rules or regulations; they are enactments, but they are not, in my judgment, enactments by which the fund is regulated. The Acts define pensions in relation to funds and then provide for certain increases; but they are not statutes that regulate the fund: they are statutes that relate to certain recipients from the funds.

We made inquiry from the bench and received from Mr. Francis information as to the way in which administratively the

Pensions (Increase) Act, 1944, had been put into effect. Whatever may have been done for administrative purposes is, however, immaterial. The increases resulting from the Pensions (Increase) Acts, 1944 and 1947, if they applied in the present case, would be increases that would come out of the county rates and they would not be payments out of the fund. Reference has been made to s. 5, sub-s. 2, of the Act of 1944. That provides that: "Where any such pension as is specified in para. 1 of Pt. II of "the First Schedule to this Act is increased under the provisions "of this Act, the cost of the increase shall be defrayed by the "pension authority". Those are not words which would cover the appellant. The appellant is not one who, within the wording of Pt. II of Sch. I, was solely in local government service; or, stated otherwise, her pension was not payable solely in respect of local government service.

For those reasons, the conclusion at which I have arrived is that the appellant has not brought herself within any statutory enactment entitling her to receive the increases of her superannuation allowance nor empowering the London County Council to pay the increases. I, therefore, consider that this appeal must be dismissed.

LLOYD-JACOB, J. I would respectfully adopt the statement of the circumstances of the present case which has fallen from my Lord and proceed direct to the relevant portions of the statute. In passing, I would add that, in addition to the provisions of s. 73, sub-s. 3, of the Act of 1933, there is a provision in sub-s. 4 for compulsory arbitration. For my part, I desire to make it plain that in nothing I am about to say am I holding that this appellant is debarred from the reference to which that sub-section relates.

The material question, in my judgment, falls to be determined according to the true construction of s. 80 of the London Passenger Transport Act, 1933, and in particular of sub-ss. 9 and 10 thereof. I, myself, find no difficulty in construing sub-s. 9 as being a representation to transferred persons that they are to regard their continued employment as equivalent to employment by the local authority. Sub-section 9 begins by stating that membership of a superannuation fund shall continue during the service with the authority to whom the servant is transferred. It then provides that any enactment, regulation and the like by which the local authority regulate their fund shall, notwithstanding the transfer of the servant, continue to apply to the local authority in respect of that servant; and the sub-section concludes by reciting that the servant shall be entitled to every benefit to which continued service with the local authority would have entitled him. The sub-section is in terms related to the position whilst the servant continues to be a member of the fund, and sub-s. 10 is concerned with the position when the servant ceases to be a servant of the authority. Sub-section 10 provides that, as and when such service is terminated, the provisions of any enactment or regulation or the like which would have been applicable upon his leaving the service of the local authority shall apply as though he had never changed his employment and never ceased to be solely in the employment of the local authority. In my judgment, it was clear from the passing of that Act that these transferred persons were entitled to assume, in respect of their membership of the London County Council Superannuation and Provident Fund (provided that they continued their contributions and continued to perform their appropriate service during the period of their employment) that their rights and obligations in relation to the fund had in no sense changed. In terms both these sub-sections refer to an enactment or scheme or rule or regulation by which the fund is regulated. It was argued that this language requires the court to accept that, whatever enactment, rule or regulation is in force at the date of the termination of the employment, that will prescribe the governing conditions with regard to the pension. For my part, I should hesitate a long time before I accepted that view. If at the cessation of employment an enactment in fact regulates the fund in the sense of determining the appropriate pension which will be payable, any amendment or modification of that enactment ought, in my judgment, to apply to persons who are already receiving payment as much as to those whose pension rights have not yet accrued.

If, therefore, I could find the Pensions (Increase) Acts of 1944 or 1947 to be " any enactment or scheme or any rule or regula- " tion by which that fund is regulated ", I should hold that the appellant was entitled to succeed. But reference to both those Acts (and for this purpose I need refer only to the Act of 1944) indicates quite clearly that they are not enactments by which the fund is regulated. It is conceded that as a matter of language this appellant does not fall within the category of a person to whom Sch. I, Pt. II, is particularly directed. The argument was addressed to us that, having regard to the statutory provision in

1944 for an increase of pensions payable solely in respect of local government service, those whose service with the Transport Board might, in fairness, be deemed to be local government service ought properly to be regarded as entitled to the benefit which the Act confers upon those who remain throughout their working life in local government service. The misfortune of that particular argument rests in this, that, to enable the appellant to succeed, any enactment which she prays in aid must be an enactment by which the fund is regulated; and reference to s. 5, sub-s. 2, of the Pensions (Increase) Act, 1944, makes it plain that the enactment dealing with these increases is not directed to the regulation of the fund at all. It is in these terms: " Where any such pension as is " specified in para. 1 of Pt. II of Sch. I to this Act is increased " under the provisions of this Act, the cost of the increase shall " be defrayed by the pension authority ". The proviso as to contribution or reimbursement if the pension authority are not the last employing authority is immaterial for the purposes of the particular argument to which these observations are directed. The statutory provision that the cost of the increase shall be a burden upon the pension authority is a clear indication that such increase does not arise from a regulation of this Superannuation and Provident Fund.

For these reasons, in my judgment, this appeal fails.

SINGLETON, L.J. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Rexworthy, Bonser & Wadkin; J. H. Pawlyn.*

C. G. M.

HANILY *v.* MINISTER OF LOCAL GOVERNMENT AND PLANNING AND ANOTHER.

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July 30.

Cohen and Singleton, L.JJ.

Town and Country Planning—Compulsory purchase order—Objection by person aggrieved—On ground that authorization not empowered by statute—Application to be made within six weeks from notice of confirmation order, etc., first published—Proposed amendment by adding further reason for objection—Jurisdiction—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sched. I, Part IV, paras.* 15 (1.) *&* 16—*R. S. C., Ord.* 55B, *rr.* 71, 73 *and* 75.

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By an originating notice of motion, made under R. S. C., Ord. 55B, r. 71, within the six weeks specified in para. 15 (1.), Sch. I, to the Acquisition of Land (Authorisation Procedure) Act, 1946, the applicant invited the court to hold that the making of a compulsory purchase order by the Central Land Board, and confirmed by the Minister of Local Government and Planning, was not made within the powers conferred by s. 43 of the Town and Country Planning Act, 1947. In that notice of motion the applicant stated three reasons as grounds for that conclusion. After the expiration of the six weeks and before the notice of motion came on for hearing, the applicant applied for leave to amend her notice of motion by adding a further and separate reason as ground for that conclusion. Ormerod, J., dismissed the application on the ground that the court had no jurisdiction to make the order asked for. On appeal:—

Held, that the court had jurisdiction to make the order for amendment. All that the Act prescribed was that the person aggrieved must establish that the authorization of the compulsory purchase order granted was not empowered. That was claimed within the time limit required. By R. S. C. Ord. 55B, r. 75, the ordinary practice and rules of the King's Bench Division applied, so far as they were applicable on such an application and so far as they were not inconsistent with the provisions of the "Acts "referred to in this part of this order, or of the rules contained "therein", and these included the power to allow amendments under R. S. C., Ord. 28, r. 1.

Appeal from Ormerod, J.

A compulsory purchase order of land was made by the Central Land Board, and confirmed by the Minister of Local Government and Planning. Objection was taken by Miss Hanily, the applicant, in accordance with para. 15 (1.) of Sch. I to the Acquisition of Land (Authorisation Procedure) Act, 1946. See Pt. IV of the Schedule concerning the validity and date of operation of compulsory purchase orders and certificates (1).

By her originating notice of motion (made within the six weeks specified in para. 15 (1.) of Sch. I to the Acquisition of Land (Authorisation Procedure) Act, 1946 (1)), the applicant invited

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(1) Acquisition of Land (Authorisation Procedure) Act, 1946, Sch. I, Pt. IV, para. 15 (1.): "If any person "aggrieved by a compulsory purchase "order desires to question the validity "thereof, or of any provision con"tained therein, on the ground that "the authorisation of a compulsory "purchase thereby granted is not "empowered to be granted under this "Act or any such enactment as is "mentioned in sub-s. 1 of s. 1 of this "Act, . . . he may, within six weeks "from the date on which notice of the "confirmation or making of the order ". . . is first published in accordance "with the provisions of this schedule "in that behalf, make an application "to the High Court, and on any such "application the court—(*a*) may" inter alia suspend the operation of the order; or if satisfied that the

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the court to say that the making of the compulsory purchase order was not within the powers conferred by s. 43 of the Town and Country Planning Act, 1947, in that: "(i) The reason for "the making of the said order was that the land to which the "same relates was being offered for sale and sold by the appli-"cant at a price in excess of the price which in the view of the "Central Land Board was its value for the purposes of its "existing use; and/or (ii) That the said order was made because "the applicant refused to sell the land to which the order related "to a prospective purchaser on terms approved by the Central "Land Board; and/or (iii) That the said order was made, not for "the purpose of the functions of the Central Land Board nor for "the purpose of bringing into development the land to which the "said order relates, but for the purpose of preferring one approved "development of the said land to another".

Counsel for the applicant told the court that the first two grounds of the application were covered by the decision of the Court of Appeal in *Earl Fitzwilliam's Wentworth Estates Co. Ld.* v. *Minister of Town and Country Planning and Another* (2), and must stand or fall by the decision of the House of Lords in that case.

Before the motion came on for hearing, the applicant, after the expiration of the six weeks' time limit for the motion specified in para. 15 (1.) of Sch. I to the Act of 1946, applied for leave to amend her notice of motion by adding a further ground: "(iv) alternatively, that at the time of the making of the said

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authorisation granted is not empowered, quash the compulsory purchase order.

Paragraph 16: "Subject to the pro-"visions of the last foregoing para-"graph, a compulsory purchase order ". . . shall not, either before or after "it has been confirmed, . . . be "questioned in any legal proceedings "whatsoever, and shall become opera-"tive on the date on which notice is "first published as mentioned in the "last foregoing paragraph".

R. S. C., Ord. 55B, r. 71, para. 7: "An application under . . . para. 15 "of Pt. IV of the First Schedule to "the Acquisition of Land (Authorisa-"tion Procedure) Act, 1946, . . . shall "be made by an originating notice of "motion to a judge of the High "Court".

Rule 73: "The notice of motion "shall be dated as of the day of ser-"vice and state the grounds for the "application and the date mentioned "in the notice for the hearing of the "application shall be not less than "fourteen days after the service of "the notice".

Rule 75: "(1) The ordinary prac-"tice and rules of the King's Bench "Division shall apply so far as they "are applicable, and are not incon-"sistent with the provisions of the "Acts referred to in this part of this "order, or of the rules contained "therein. (2) Any party may issue "a summons returnable at the "chambers of the judge for an order "or direction on any matter of pro-"cedure".

(2) Ante, 284.

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"order, there was no planning permission under Pt. III of the "said Act for the development for the purpose of which the land "was to be disposed", and she asked for leave to file two affidavits in support of that new ground.

Ormerod, J., refused to allow the amendment. He made it plain that if he had thought that he had jurisdiction he would have exercised it in favour of the applicant.

The applicant appealed.

Kekwick for the applicant. Ormerod, J., had jurisdiction to allow this amendment. He made it clear that he would have allowed it, in the exercise of his discretion, had he considered that he had jurisdiction. In his view the terms of para. 15 (1.) of Sch. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, which contained the time limit of six weeks for the making of the application would have been broken had he made the amendment. The original application, made by notice of motion, was made within time, but this application for its amendment was made after the expiration of the time limit stated in para. 15 (1.). And the judge held that he had no power to make it.

[SINGLETON, L.J. But all that the statute prescribes is that the person aggrieved must show by his application that he desires to question the validity of the order, "on the ground that the "authorization of a compulsory purchase thereby granted is not "empowered to be granted under this Act" within the six weeks there stated.]

Yes; that is the sole statutory ground, in effect, the cause of action. The reasons which may be put forward in support of the ground may be many. The Act does not provide how the application is to be made. For this, the court must have regard to the Rules of the Supreme Court. By R. S. C., Ord. 55B, r. 73, the notice of motion must state the grounds of the application and that requirement has been satisfied. By r. 75 the ordinary practice and rules of the King's Bench Division must apply so far as they are applicable and are not inconsistent with the Act. By R. S. C., Ord. 28, r. 1, the court had jurisdiction to allow this amendment.

J. P. Ashworth for the respondents, the Minister and the Central Land Board. The respondents only wish to take the point as to jurisdiction to make the amendment. They do not desire to challenge the exercise of the judge's discretion. He intimated that he would have made the order for amendment of

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the notice of motion had he had the power to do so. He was right in holding that he had no such power. By analogy the amendment asked for was the adding of a new cause of action on behalf of the applicant: see *Marshall* v. *London Passenger Transport Board* (3) and *Batting* v. *London Passenger Transport Board* (4). At the moment there are three grounds of action which the applicant has put forward in her notice of motion, duly made in time. This is an attempt to put forward a fourth ground, out of time. [*Summers* v. *Minister of Health* (5) was also mentioned.]

COHEN, L.J. Mr. Ashworth, who appears for the Minister, very properly, if I may say so, said that he did not desire to argue the question how the discretion should be exercised, if discretion there was. He agreed that, if we thought that there was a discretion, we should act as the judge would have done and make the order; but he submitted that the judge was right in thinking that he had no jurisdiction to make the order. The ground on which the judge came to that conclusion was that he treated the matter as governed by the decisions in which this court has refused applications to amend which involve, in effect, raising a new cause of action which would be barred by the Statute of Limitations, if a new writ had to be issued.

Mr. Ashworth called our attention to two cases in which that principle was laid down. One was the case of *Marshall* v. *London Passenger Transport Board* (6), and the other *Batting* v. *London Passenger Transport Board* (7). It will be sufficient, I think, if I refer to a short passage from the judgment of Lord Wright, then Master of the Rolls, in the first case. That was a case where there was a question of setting up a different case of negligence from that in the original statement of claim. Lord Wright said (8): "The question is whether that involves a new "cause of action within the meaning of the Public Authorities "Protection Act, 1893, within the meaning of the words which I "have just read. I think it does, and I think that the learned "judge was right in dismissing the application, because it is well "settled that an amendment will not be allowed if its introduc-"tion would deprive the defendant of a defence under the Statute

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(3) [1936] 3 All E. R. 83.
(4) [1941] 1 All E. R. 228.
(5) [1947] 1 All E. R. 184.
(6) [1936] 3 All E. R. 83.
(7) [1941] 1 All E. R. 228.
(8) [1936] 3 All E. R. 83.

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"of Limitations or under the Public Authorities Protection Act, "1893—in other words, if it is something which involves a new "departure, a new head of claim or a new cause of action". Strictly speaking, here we are not dealing with a question of a new cause of action at all. As my brother Singleton pointed out in the course of the argument, all that the Act itself prescribes is that the person aggrieved must establish that the authorization of the compulsory purchase order is not empowered to be granted under this Act. So far as the Act itself is concerned, that would be all that it is necessary to allege. It is true that the Rules of the Supreme Court have themselves gone further, because by Ord. 55B, r. 73, it is provided that the notice of motion shall state the grounds for the application. But that is not a statutory provision; it is a provision made by the rules, and it seems to me, therefore, that there is nothing inconsistent with the provisions of the Act, in applying to the full the power which the court has under R. S. C., Ord. 28, r. 1, to allow an amendment, provided, of course, that the original notice of motion clearly raised the point that the authorization was not empowered to be granted under the Act. It seems to me that really all that the applicant is here seeking is leave to deliver further and better particulars of the allegation that she has made in her original notice of motion. Mr. Ashworth suggested that the Act intended to impose an absolute limit of six weeks; but the fact that such a short period is specified inclines my mind against that view. I can find nothing in the statute which drives us to the conclusion that the courts are deprived of their ordinary power to allow an amendment in a proper case. I will not say anything about the merits of this case, but there is a good deal to be said on the question of delay if Mr. Ashworth had desired to raise it. He prefers a decision on the question of principle, and on principle I think that Ormerod, J., had the power to allow the amendment; and, as I have already said, it is common ground that he would have allowed it if he had felt that he had the power.

I only wish to add one further word. There was disclosed what prima facie seemed to me a somewhat high-handed action by the London County Council. An explanation of that has been tendered to us by Mr. Ashworth. Whether or not it was an entirely satisfactory one, I should not like it to be said that we

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had made any reflection on them, because they are not here to defend themselves.

In my opinion this appeal should be allowed.

SINGLETON, L.J. I agree.

Appeal allowed and amendment made.

Solicitors: *Stow & Co.; The Treasury Solicitor.*

C. G. M.

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Lord Asquith of Bishopstone, Birkett, L.J., and Lloyd-Jacob, J.

Considered. HAYWARD v. MARSHALL [1952] 1 Q.B. 89

Considered. HAYWARD v. MARSHALL [1952] 2 Q.B. 89

Landlord and tenant—Rent restriction—Claim for possession—Terms of settlement—Tenancy of part of house—Kitchen not specified—"Landlord to have sole use of two rooms"—"Tenant to have licence "to use kitchen at all reasonable times"—"Tenancy to be within "Rent Acts"—House occupied under settlement—New claim by landlord for possession—Whether letting to defendant of "separate "dwelling"—No ouster of jurisdiction—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 16, *sub-s.* 1.

A demise confers an estate in land and exclusive possession of it; a licence to enter on land confers neither, but merely a right to use realty without being guilty of trespass. Accordingly, as between the parties to "the sharing" of a living room in a house subject to the Rent Restriction Acts—landlord and tenant—the rights in the room shared, enjoyed by each, may be disparate. If a landlord grants a tenancy of a whole dwelling-house to a tenant, less the kitchen (an essential living room), and a right to the tenant to use the kitchen along with himself, then the tenant is unprotected by the Rent Restriction Acts. But if all the dwelling-house, including the kitchen, is let to the tenant, who then grants to the landlord a right or licence to use the kitchen in common with himself, the tenant is so protected. This proposition is explicit in the logic of the decision of the House of Lords in *Baker* v. *Turner*, [1950] A. C. 401.

In an action for possession of a dwelling-house by a landlord against a tenant who, at the time of the issue of the plaint note, was a statutory tenant, the parties settled the action on the terms that the action be withdrawn; that the tenant be granted a weekly tenancy of part of the house, the kitchen not being one of the specified rooms; that the landlord have the sole use of two rooms, neither of which was the kitchen; that the parties should share a cupboard on the stairs and a box-room and should have the joint use of bathroom, W.C., hall, pantry, bogey hole and garage; that the tenant should have a licence to use the kitchen at all reasonable times; that the landlord should pay the rates; and that the tenancy should be within the Rent Restriction Acts. On a subsequent action for possession against the tenant by the landlord's successor:—

Held, by Lord Asquith and Birkett, L.J., Lloyd-Jacob, J., dissenting, that, on those terms of settlement, the tenancy did not extend to the kitchen, and that, since the tenant had a licence to use the kitchen in the possession of the landlord, irrevocable for the term of the lease, the tenant was not protected by the Rent Restriction Acts. Further, the parties were unable to bring a tenancy within the protection of the Rent Restriction Acts merely by a contractual provision to that effect, and they could not of their own volition oust or reduce the jurisdiction of the court to grant an order for possession.

Per Lloyd-Jacob, J. (dissenting on the construction of the terms of settlement). When settling, the tenant was a statutory tenant of the whole house. To justify an order of possession the landlord had to establish that, on the terms of settlement, the tenancy did not extend to a separate dwelling which included an essential living room, i.e., a kitchen. That he failed to prove. No express words in the terms excluded the kitchen from the tenancy.

The reference in the terms of settlement to the Rent Restriction Acts was not an attempt by contract to limit the jurisdiction of the court, but an acknowledgment by the parties that forfeiture of protection under the Rent Restriction Acts was not contemplated or intended.

APPEAL from Judge Hamilton sitting at Coventry county court.

In June, 1940, the defendant, Miss Hyde, became the contractual tenant of No. 75 Allesley Old Road, Coventry. The landlord, one Cleaver, served a notice on her to quit in June, 1945, and, on its expiration, the tenant became the statutory tenant of the whole house. Cleaver then sued for possession. At the hearing on July 23, 1945, the proceedings were adjourned in the hope of a compromise, with liberty to either party to apply, and (either by order of the county court or otherwise), an interim modus vivendi was brought into operation whereby the landlord Cleaver was to share part of the house with the tenant. Cleaver moved in, occupied certain rooms for himself, but "shared" the use of the kitchen with the tenant. In April, 1949, Cleaver, who then wanted to obtain possession of the whole house, restored the claim for possession, made in 1945, to the list. The case was again adjourned for terms to be agreed, and they were agreed in writing on April 11, 1949.

So far as relevant, the terms of the settlement were as follows:

1. Present action to be withdrawn upon following terms.
2. No order as to costs.

3. Miss Hyde to be granted weekly tenancy of part of house at 75 Allesley Old Road, Coventry.
4. (a) Miss Hyde to have sole use of back bedroom and back sitting-room.
   (b) Miss Hyde to pay rent of 14*s.* 3*d.* per week.
   (c) Miss Hyde to pay 2*s.* 6*d.* per week for gas and electricity, not to include gas in Miss Hyde's bedroom, for which she will pay.
   (d) Miss Hyde to have free access to hall via front door.
5. Mr. and Mrs. Cleaver to have sole use of front bedroom and front sitting-room.
6. Parties to share:
   (a) cupboard on stairs and boxroom;
   (b) to have joint use of bathroom, W.C., hall, pantry, "bogey-hole" and garage.
7. Work of cleaning the jointly used parts to be shared equally.
8. Garden:
   (a) front to be maintained by Mr. and Mrs. Cleaver;
   (b) back to be maintained by Miss Hyde.
9. Miss Hyde to have licence to use scullery (kitchen) at all reasonable times.
10. Mr. and Mrs. Cleaver to pay rates. Miss Hyde's tenancy to be within Rent Acts.
11. Agreement to be in force forthwith.
12. Miss Hyde's solicitors to supply copy of the agreement to Mr. and Mrs. Cleaver.

A few months later Cleaver sold the house to the plaintiff, Rogers, who moved into the premises occupied by Cleaver. In January, 1951, the plaintiff, having given notice to quit which had expired, sued for possession on the ground that there was in existence a "sharing" arrangement, so that the premises were not "let" to the tenant "as a separate dwelling": see s. 16, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

The county court judge granted the plaintiff landlord possession of the tenant's rooms in the house, and the tenant now appealed.

Michael Davies for the tenant. The county court judge misdirected himself in holding that, on the terms of settlement agreed between Cleaver and the tenant on April 11, 1949, Cleaver had not let to her the premises as a separate dwelling. In 1945, when the first action for possession was brought, the tenant was a

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statutory tenant, and in April, 1949, she had not, during the adjournment of the action from 1945 to 1949, by the " sharing " of the use of the kitchen, invalidated her position as a statutory tenant. From April, 1949, the tenancy of these premises was a new one, and that tenancy, by the terms of settlement of April 11, 1949, was the letting of a separate dwelling: see s. 16, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. A new contractual tenancy was created from that date: see *Foster* v. *Robinson* (1).

The court therefore has to examine the terms of settlement to see whether by that tenancy the tenant occupied a separate dwelling from that date. There is no question that the parties desired and intended that the tenant should enjoy a tenancy protected by the Rent Restriction Acts: see cl. 10 of the terms of settlement. The tenant would like to affirm that cl. 10 concludes the matter, but she cannot do that: if there is a genuine agreement its terms must be examined to see whether the tenancy is protected; if it is not, the parties cannot by contract say that it is.

The court must therefore examine the terms of settlement: the tenant is granted a weekly tenancy of a part of the house; the landlord has the sole use of two rooms in the house. There is no mention so far of the kitchen. Then the parties share a cupboard and box-room and are to have the joint use of bathroom, W.C., hall, pantry, bogey hole and garage. Then by cl. 9 the tenant is to have licence to use the scullery (kitchen) at all reasonable times. If a licence is granted to a tenant to use the kitchen, that is not necessarily a " sharing " of the kitchen such as was found in *Neale* v. *Del Soto* (2). The licence to use the kitchen is granted to the tenant quite independently of the tenancy of part of the house granted. The licence could be withdrawn if the landlord relet the rooms of the tenancy. In *Neale* v. *Del Soto* (2) the oral agreement was the sub-letting of two rooms in a house containing seven rooms with the use by tenant and sub-tenant jointly of garage, kitchen, bathroom, lavatory, coal-house and conservatory. Here in the written terms of settlement the provision for a licence to use the kitchen at all reasonable times was quite separate from the tenancy.

The decision of Judge Neal in *Rainger* v. *Kerrison* (3) is adopted as part of the present argument. He said: " Where

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(1) [1951] 1 K. B. 149.
(2) [1945] K. B. 144.
(3) (1947) 14 L. J. N. C. C. R. 288, 291.

"there is on the face of it a letting otherwise clearly within the "ambit of the Act, there seems to be no reason for holding that "a licence, even a contemporary one, should alter its nature so "as to deprive the tenant of the benefit of the Act". The judge in *Rainger* v. *Kerrison* (3) said that the decision of Hilbery, J., in *Dakyns* v. *Pace* (4) afforded him some support.

In *Bowler* v. *Williams* (5) the county court judge had found that the kitchen was among the rooms let to the tenant; that there was no agreement to share it; but that there was a temporary licence granted by the tenant to the landlord to use the kitchen for a few weeks. On these facts the Court of Appeal held that there was no "sharing" of the kitchen by the tenant, so as to remove from the tenant the protection of the Rent Restriction Acts. In that case it was plain that the licence did not necessarily last as long as the letting, and that, it is submitted, is the case here.

In *Cole* v. *Harris* (6) MacKinnon, L.J., said (7): "The judge "held that the plaintiff's claim failed because the three rooms "were not let to him as a separate dwelling within s. 12, sub-s. 2, "of the Act of 1920; and he came to that conclusion upon what "he took to be the principle laid down by this court in *Neale* v. "*Del Soto* (8). In my view the decision in that case was rather "upon the admitted facts than upon any principle of law. In so "far as any such principle can be derived from it, I do not think "it was correctly enunciated by the judge in the present case. "In effect, it was held in that case that there was no letting of "part of the house as a separate dwelling, but an agreement by "the plaintiff and defendant to share the house. As Morton, L.J., "said (9), 'the substance of the matter was that there was a "'sharing of the house. Each party had the exclusive use of "'some rooms and the two parties together had the use in "'common of other rooms'. These two contrasted sorts of "agreement—(a) a demise of part of a house as a separate "dwelling, and (b) an agreement to share the use of a house, are "perfectly intelligible. Whether any particular agreement falls "under (a) or under (b) is much more a question on the facts "than of any rule of law".

The arrangement in the case before the court falls under category (a) and not under category (b). The phraseology of s. 7 of the Landlord and Tenant (Rent Control) Act, 1949, is of interest. It is: "Where under any contract—(*a*) a tenant has the exclusive

(4) [1948] 1 K. B. 22.
(5) [1949] W. N. 180.
(6) [1945] K. B. 474.
(7) Ibid. 478.
(8) [1945] K. B. 144.
(9) Ibid. 147.

"occupation of any accommodation, (*b*) the terms on which he "holds the accommodation include the use of other accommodation in common with his landlord or with his landlord and other "persons, and (*c*) by reason only of the circumstances mentioned "in para. (*b*) of this section, the accommodation referred to in "para. (*a*) thereof is not a dwelling-house to which the principal "Acts apply, the Act of 1946 shall apply to the contract, notwithstanding that the rent does not include payment for the use "of furniture or for services". The criterion there is "the use "of other accommodation in common with his landlord", and that appears to be the view of the legislature of the effect of *Neale* v. *Del Soto* (10). Here there was "no use of other accommodation in common with his landlord". That phrase was limited to rooms which were not living rooms in cl. 6 (*b*) of the terms of settlement. [He was stopped.]

Megarry for the landlord [asked by Asquith, L.J., first to explain the distinction for the relevant purpose between a "sharing" in a room and a licence to use a room]. It is submitted that there is no such distinction. The "sharing" or use in common of a room implies a licence to use it.

[Asquith, L.J. Yes, but a licensee cannot paint the wall of a room or admit another licensee to the room.]

But the use of the room is still shared. It is clear from the decision in *Baker* v. *Turner* (11) that the determination of the issue in cases where there is a sharing of a living room depends on the answer to the question: what part of the house is demised to the tenant? If three rooms are demised to a tenant one of which is the kitchen, then the tenant can safely allow his landlord to use the kitchen. He has been let a separate dwelling over which he has full control. He does not lose the protection of the Rent Restriction Acts.

But if the tenant is granted a demise of two rooms plus a sharing of the kitchen, whatever that sharing may be, joint use or a licence, then on the decision in *Neale* v. *Del Soto* (10) there is no letting of a separate dwelling to the tenant and he is not protected by the Rent Restriction Acts.

Those were the facts here. The tenant had the right to use the kitchen as part of the terms on which she held the tenancy of her part of the house, and the decision of the county court judge was right. This distinction appears clearly from the reasoning involved by the decision of the House of Lords in *Baker* v.

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(10) [1945] K. B. 144.

(11) [1950] A. C. 401.

Turner (11), where a tenant sub-let and the landlord claimed possession of the whole house. It was held that the tenant of the premises who had sub-let a furnished bed-sitting room with the use of the kitchen was protected under the Rent Restriction Acts. The facts in *Dakyns* v. *Pace* (12) show that the tenant of the demised premises allowed her landlord part use of the kitchen, and she was held to be a statutory tenant. In *Krauss* v. *Boyne* (13) the kitchen was not let to the tenant, as were the three rooms, and the tenant was held not to be protected.

In this case by the terms of settlement the parties had entered into a new arrangement and the court has to see whether the Rent Restriction Acts protect the tenant, having regard to those new terms: *Foster* v. *Robinson* (14). The house was the landlord's, and the part let to the tenant did not include the kitchen. The tenant was granted a licence to use the kitchen which had not been demised to the tenant and was in possession of the landlord. For example, the landlord could paint the kitchen, the tenant could not.

[*Cole* v. *Harris* (15) and *Kenyon* v. *Walker* (16) were referred to on the meaning of "sharing" a kitchen.]

Michael Davies [resuming his argument]. This case is distinguishable from *Neale* v. *Del Soto* (17) on four grounds: (a) this licence was, as was the arrangement between landlord and tenant for the use of a kitchen in *Dakyns* v. *Pace* (18), a personal contract and was not assignable at law; (b) this licence could have been determined, apart from the determination of the tenancy, by the landlord, whereas the "sharing" in *Neale* v. *Del Soto* (17) could not have been so determined; (c) this licence does not, as in *Neale* v. *Del Soto* (17), grant a joint use with anyone else, as was the case in these terms of settlement with regard to bathroom, W.C., hall, bogey-hole and garage; the licence was merely a licence to the tenant to use the kitchen; and (d) whether or not this licence could be determined separately apart from the other arrangements between the parties, it was not, as were the arrangements in the *Del Soto* case (17), an essential part of the letting.

As to *Baker* v. *Turner* (19), that case was decided on the footing that "the use of kitchen" granted by the tenant to the sub-tenant was indivisible from the demise: that case has no application to a case where the grantor is not the tenant, but the owner.

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(11) [1950] A. C. 401.
(12) [1948] 1 K. B. 22.
(13) [1946] 1 All E. R. 543.
(14) [1951] 1 K. B. 149.
(15) [1945] K. B. 474.
(16) [1946] 2 All E. R. 595.
(17) [1945] K. B. 144.
(18) [1948] 1 K. B. 22.
(19) [1950] A. C. 401.

Cur. adv. vult.

May 10. The following judgments were delivered, the judgment of Lord Asquith being read by Birkett, L.J.:—

Lord Asquith. The whole case in my view turns on the construction of the terms of the settlement of April 11, 1949. There is no doubt that the defendant was a statutory tenant just before July, 1945. There was at certain stages in these proceedings some debate as to whether the defendant was divested of that character by what I have called the "modus vivendi" of 1945–49, with its de facto sharing of the kitchen. I do not think it matters whether, during that period, the defendant was a statutory tenant or not. In either case the possession from April 11 on was governed by the instrument of that date. If the preceding tenancy was contractual, this is obvious: if it was a statutory tenancy, there is recent and binding authority for the proposition that a contractual (and non-protected) tenancy can replace a statutory tenancy by a notional surrender and regrant or by other means: see, for instance, *Foster* v. *Robinson* (20), a case recently decided by the Court of Appeal.

The question is what the terms of settlement of April 11, 1949, mean. Do they, on their true construction, provide for a "sharing" of the kitchen in the pejorative sense of the word "share"? If they do, the defendant is unprotected, for the law, ever since *Baker* v. *Turner* (21) and the Landlord and Tenant (Rent Control) Act, 1949, seems to me to leave intact the proposition that where a landlord confers on a tenant the right to use, in common with himself, an essential living room, for example, the kitchen, the tenant is not the tenant of a dwelling-house "let as a separate dwelling". I will deal later and more fully with the decision of *Baker* v. *Turner* (21). In using the term "sharing" in this connexion I have been careful to enclose it in inverted commas, to show that I am not unmindful of the strictures which Lord Porter, in *Baker* v. *Turner* (21), has passed on its misleading implications. I have nevertheless retained it, because it is so inveterately embedded in the *Neale* v. *Del Soto* (22) set of decisions that it is difficult to dislodge or to replace with any paraphrase of comparable brevity.

(20) [1951] 1 K. B. 149.
(21) [1950] A. C. 401.
(22) [1945] K. B. 144.

To return to the "terms" of April 11, 1949. Two points stand out in relation to these terms, first, by No. 10 of them, the parties are attempting by a contractual provision to bring the house within the protection of the Rent Restriction Acts. This, in my view, they cannot do. Parties cannot of their own volition oust or reduce the jurisdiction of the courts to grant orders for possession. Secondly, the draftsman is clearly familiar with the *Neale* v. *Del Soto* (22) series of cases and is trying so to frame his terms as to effect a "sharing", without divesting the house of any protection it may enjoy under the Acts. He realizes that, under the decisions, the kitchen is, but that neither the bathroom, W.C., nor garage is an "essential living room"; he realizes that one can safely "share" the latter, but not the kitchen. He therefore provides that the bathroom, W.C., and garage shall be shared, or used in common, but is careful, in relation to the kitchen, (a) to avoid expressions such as "share" or "use in "common with"; (b) to employ the word "licence" instead; and (c) to deal with the kitchen and the rights or liberties conferred in respect of it in a clause of the instrument which is in form self-contained and segregated from the corresponding provisions in respect of the bathroom, W.C., and garage.

The first point to be determined is whether the grant by the landlord in respect of the kitchen of a right deliberately not described as one of "sharing" or of "joint or common user", but described as a "licence to use . . . at all reasonable times", distinguishes the case from the *Neale* v. *Del Soto* (22) type of case, and leaves it open to the tenant to claim the protection which in the *Neale* v. *Del Soto* (22) type is excluded. In other words, is the right given to a tenant in a *Neale* v. *Del Soto* (22) case something which differs from, and exceeds, a licence?; I mean, for this purpose, a licence irrevocable for the term of the lease of the rooms exclusively let, for a licence determinable earlier will presumably create no "sharing". There is no doubt that in some of the cases a distinction has been drawn between these two things, a "sharing" and a "licence". A good example is the county court decision in *Rainger* v. *Kerrison* (23). This case, though not technically binding on this court, is a carefully reasoned decision, to be treated with respect. There seems to have been a lease to a tenant of premises which included a kitchen, subject to a licence given by the tenant to the landlord, simultaneously, to use the kitchen. The county court judge held

(22) [1945] K. B. 144.

(23) 14 L. J. N. C. C. R. 288.

(a) that the terms of the letting, not the de facto arrangements as to the subject-matter let, governed the legal position quoad the Rent Restriction Acts, and (b) that the licence granted to the landlord was a de facto arrangement, which did not defeat the protection of the Acts. The relevant question, said the judge, is: "What was demised?" The kitchen was demised. A licence to the landlord to use it given by the tenant, perhaps later, perhaps not to last as long as the lease, could not alter this position.

In *Bowler* v. *Williams* (24) a Court of Appeal decision, the county court judge had found that the kitchen (or scullery) was among the rooms let to the tenant; that there was no agreement to share it; but that there was a temporary licence granted by the tenant to the landlord to use the kitchen or scullery for a few weeks. The Court of Appeal on these facts held there was no "sharing" such as to remove the protection of the Acts. These were both cases in which the tenant, having exclusive possession of the kitchen, granted a licence over it to the landlord and not vice versa.

Before considering the argument advanced by Mr. Megarry for the plaintiff, the landlord, in support of the order for possession, it is necessary to determine the impact on the issues involved of the decision of the House of Lords in *Baker* v. *Turner* (25). Until their Lordships decided that case, there was a tendency to assume that if A "shared" a subject-matter with B, B "shared" that subject-matter with A, in a sense of the word "shared", which applied impartially as between them. *Baker* v. *Turner* (25) in the present connexion gives the quietus to this facile assumption, and decides that where there are two people sharing, they need not "share" in the same sense or on an equal basis: they may, if the barbarism can be tolerated, the one be "sharer" and the other "sharee". As between the parties to the sharing, the rights in the thing shared enjoyed by each may be disparate. Both Lord Porter and Lord MacDermott make this clear in relation to the facts before them in that case. A let to B. B sub-let to C, subject to liberty on the part of C to use the kitchen in common with B. Here C is "sharing" with B, and for that reason unprotected by the Acts. But B is not sharing with C, and retains protection of the Acts. Why? Because the quality of B's rights in the kitchen differs wholly from the quality of C's rights in it. B can (it may be must) repair and redecorate the kitchen; he can hang in it what pictures

(24) [1949] W. N. 180.

(25) [1950] A. C. 401.

he likes, can turn on the wireless, and can admit other licensees to use it. C cannot do any of these things. B in this connexion is dominant, C is servient; B can say of C: "You are a mere "sharer; I can extrude you, you cannot say I have let to you a "separate dwelling". But C cannot say the same to B, for B retains a general exclusive dominion of the kitchen, subject only to the licence given by him to C.

In *Baker* v. *Turner* (25) it so happened that three parties were involved—the lessor, lessee and sub-lessee. But the logic of the decision must necessarily apply to a case in which there are only two parties—X lessor and Y lessee. As between these two, if there be a lease to the lessee of, say, the whole house less the kitchen, and the grant of a right to the lessee to use the kitchen along with the lessor, then the lessee is unprotected. But if all the house, including the kitchen, is let to the lessee, who then grants the lessor a right or licence to use the kitchen in common with himself, the lessee continues protected. In other words, the grantor of the right to share is in a very different position from the grantee: the grantee of such a right is not the lessee of a separate dwelling. *Baker* v. *Turner* (25) does not expressly decide this, but it seems to me firmly explicit in its logic.

This is the foundation of Mr. Megarry's argument for the landlord, the plaintiff in this appeal. Mr. Megarry argues that the subject-matter of a so-called "sharing" must be a recognized juridical entity. The subject-matter of a demise is a physical item of realty. A demise confers on Y exclusive possession of this item, and an "estate" in it. A licence confers neither, but only permission to use this item of realty without being guilty of a trespass. But he contends that any right intermediate between the two, a right of joint or common user capable of being demised, is a legal chimera. Mr. Megarry accordingly boldly argues that where a demise of certain rooms is accompanied with a grant of user of other rooms, in common with the landlord, the right of user of the other rooms, though sometimes spoken of as "let", is nothing more or less than a licence to use them, co-extensive in duration with the lease. In my view his submission is supported by the following passage from the speech of Lord Reid in *Baker* v. *Turner* (26): "If a tenant has to share with another person a "living room which is not let to him, it is, in my view, impossible "to find anything which is let to him as a separate dwelling. It "cannot be the let rooms plus the right to use the other room,

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(25) [1950] A. C. 401.

(26) Ibid. 437.

"because that other room is not let to him at all—he is only a "licensee there". Mr. Megarry couples this submission with another, namely, that the recipient of such a licence from his landlord is a "sharer" or "grantee" disabled as such from enjoying the protection of the Acts while the grantor of the licence is not. Of course, where the landlord is the grantor, as in the present case, he does not need this particular kind of immunity. But where, as in *Baker* v. *Turner* (25), the position of a head lessee who has sub-let as against the head landlord, has to be determined, his possession of that immunity may make all the difference to him.

For myself, I accept Mr. Megarry's argument in its essentials so far as they are applicable in this case. The grantee of a licence to use a kitchen seems to me to differ in name only from the grantee of a right to "share" or use it in common with the landlord. I asked counsel for Miss Hyde to indicate what the grantee of either right could do to the room which the grantee of the other right could not, and I do not consider that he had any real answer to this question. If we decided otherwise the effect of *Neale* v. *Del Soto* (27), which has been accepted by the House of Lords, could be circumvented in every case by simply substituting the word "licence" for "share" or for "right to use in "common".

For these reasons I consider the appeal should be dismissed.

BIRKETT, L.J. I agree entirely with the reasons formulated in the judgment of Lord Asquith and with his decision. For myself, I do not desire to add anything further.

LLOYD-JACOB, J. It is with regret that I find myself unable to concur in the conclusion reached by my brethren.

The decision of the House of Lords in *Baker* v. *Turner* (25) has now made manifest that the fact of multiple use of an essential living room does not necessarily result in depriving the portion of a house which includes that living room of its character of a separate dwelling, and that protection by the Rent Restriction Acts is only lost if the occupation enjoyed by the statutory tenant is not of a separate dwelling.

The tenant was possessed of a statutory tenancy of the whole premises at 75 Allesley Old Road, Coventry, in 1945, and continued in full possession until after an initial hearing of a summons

(25) [1950] A. C. 401.

(27) [1945] K. B. 144.

for possession issued by her then landlord, Cleaver, in July, 1945. That hearing was adjourned apparently to enable the parties to arrive at some suitably acceptable arrangement by which both could occupy the property, and was restored for further hearing in April, 1949. After a partial hearing terms of settlement of the proceedings were agreed and these terms were carried into practice for a short time. In August, 1949, the plaintiff landlord purchased the house from the then landlord, Cleaver, with knowledge of the terms of settlement. Cleaver vacated such portion of the premises as he had been permitted to occupy under the terms of settlement, and the landlord moved in. The landlord became desirous of selling the property, and doubtless to secure the enhancement of price, which is a consequence of vacant possession, purported to determine the tenant's tenancy by a notice to quit, and in January, 1951, instituted the present proceedings.

In my judgment the tenant was entitled to rely, during the pendency of the original summons for possession between 1945 and 1949, upon the well-established rule of law that the material time for the determination of the issues between her and her landlord was the moment when action was brought, and it would be wrong, in my judgment, to penalize her for any consideration which she showed during those years to her landlord.

The case must, therefore, be determined upon the terms of settlement dated April 11, 1949, made between the holder of a protected tenancy and her landlord. The terms provide, inter alia (see cll. 3 and 10), that the tenant was to be granted a weekly tenancy, within the Rent Restriction Acts, of part of the house and not the whole. This reference to the Rent Restriction Acts is not, as I see it, an attempt by contract to limit the jurisdiction of the court, but an acknowledgment by the parties that forfeiture of protection under the Rent Restriction Acts was neither contemplated nor intended. The sole use of certain defined rooms and the joint use of certain ancillary accommodation is specified, and by cl. 9 it is provided that Miss Hyde was to have licence to use the scullery (kitchen) at all reasonable times. Such scullery (kitchen) is admittedly an essential living room, and it is neither included within the accommodation expressly reserved either to Miss Hyde or to her landlord, nor within that expressly recited as for joint use. The evidence that both landlord and tenant have enjoyed the use of the scullery (kitchen) since the conclusion of the litigation is no more determinate of the issue than the absence of reference to it in the lists of exclusively and jointly used accommodation.

To justify an order for possession the landlord must establish that the tenancy enjoyed by the tenant does not extend to a separate dwelling which includes, as an essential living room, a kitchen. If he carried out the provisions of cll. 3 and 10, clearly such a tenancy would be created. It is contended that the presence of cl. 9 is inconsistent with such a tenancy. I cannot so regard it, particularly where, as here, the scullery (kitchen) was at the date of the settlement in fact within the tenant's tenancy. No express words exclude it from the tenancy contemplated by the terms. The language of cl. 9 is consistent with the inclusion of the kitchen within the tenancy, but because, for example, of the supply of gas and electricity, to which the provisions of cl. 4 (c) relate, the user of the services therein provided should be kept within reasonable bounds. If the licence were determined or surrendered, no doubt separate supplies of gas and electricity would need to be provided. But, in my judgment, it would be an unjustifiable extension of the *Neale* v. *Del Soto* (28) line of cases to hold that the absence of a separate gas and electricity meter prevents a set of rooms from being a separate dwelling.

Where, as here, the terms of settlement can be construed in a consistent fashion, I cannot adopt an alternative construction, which not only evades the expressed intention of the parties, but deprives the tenant of a statutory protection. For my part, I would allow this appeal.

Appeal dismissed.

Solicitors: *White & Leonard, for H. T. Cooper, Coventry; Maddocks & Colson, for G. S. N. Richards, Coventry.*

C. G. M.

(28) [1945] K. B. 144.

JARMAN *v.* LAMBERT & COOKE CONTRACTORS LD.

[1948 J. No. 1831.]

C. A.
1951
June 7, 8.

Evershed, M.R., Denning and Hodson, L.JJ.

Evidence—Admissibility—Form filled in by injured workman to support claim for workmen's compensation—Death of workman—Proceedings not "anticipated"—Form admissible in subsequent action for damages for negligence—Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1, *sub-ss.* 1, 3; *s.* 2, *sub-s.* 1.

A workman, while working alone in the course of his employment, injured his foot. With a view to making a claim through his approved society on his employers for compensation under the Workmen's Compensation Act, 1925, he gave particulars of the accident on the form supplied to him by the society for that purpose, and signed the declaration at the foot of the form that the particulars were true. Subsequently he withdrew his claim for compensation, which was never disputed by his employers, and brought an action against the defendants for damages on the ground that the accident was due to their negligence; but he died, as a result of his injuries, while the action was pending, whereupon his widow was substituted as plaintiff. On a summons taken out by her asking for an order declaring the form so filled in and signed by the workman to be admissible as evidence as being a statement made by him within the meaning of s. 1, sub-s. 1, of the Evidence Act, 1938:—

Held, that it was so admissible and was not excluded by s. 1, sub-s. 3, of that Act, for, though it was made by a person interested, no "proceedings were . . . anticipated involving a dispute as to any "fact which the statement might tend to establish", either by the workman or by anyone else at the time when it was made.

Per Evershed, M.R. "Anticipated" in that sub-section means "regarded as likely" or "reasonably probable"; but *quære* whether the statement will be excluded if proceedings are "anticipated" by persons other than the person making the statement, or only if they are "anticipated" by that person.

Per Hodson, L.J. (adopting the opinion expressed by Scott, L.J., in *Robinson* v. *Stern* [1939] 2 K. B. 260, 266): "Anticipated" should be construed as including "likely", and the statement was admissible on the footing that proceedings were not "likely" at the time when it was made.

Robinson v. *Stern* [1939] 2 K. B. 260 distinguished.

Decision of McNair, J., reversed.

APPEAL from McNair, J., in chambers.

On October 9, 1947, the original plaintiff, David Jarman, a road sweeper employed by Middlesex County Council, while working alone, caught the heel of his boot on the stump of a post on common land, and injured his foot. The injury proved a serious one, and on November 11, 1947, he filled in a form supplied to him by the National Amalgamated Approved Society, giving particulars of the accident for the purpose of making a claim through the society for compensation under the Workmen's Compensation Act, 1925. Particulars of the relevant questions and the answers to them of the workman in the form are set out in the judgment of Evershed, M.R.

The claim under the Workmen's Compensation Act, 1925, was conceded from the beginning. In January the workman's solicitors wrote to the council stating that his proper claim was against the defendants, Lambert & Cooke Contractors Ld., the contractors responsible for leaving the stump of the post on the common, and that he would not accept compensation under the Act of 1925.

In June, 1948, this action was brought by the workman for damages for negligence. The workman's foot became worse and his left leg had to be amputated, and later his right leg also was amputated. He died on July 25, 1949. By an order of December, 1949, his widow was substituted as plaintiff. In order to prove how the accident occurred, since there were no witnesses of it, the plaintiff by this summons in the action sought a declaration that the form which the workman had completed was admissible as evidence under s. 1 of the Evidence Act, 1938.

McNair, J., affirming the master, held that the form was not admissible. The plaintiff appealed.

Tristram Beresford, K.C., and *L. Halpern* for the plaintiff. It is submitted that the statement of November 11, 1947, which the workman signed, is admissible in evidence under s. 1 of the Evidence Act, 1938 (1). The judge was wrong in holding that when it was signed proceedings were anticipated by the workman with the result that, having regard to sub-s. 3, the statement

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(1) Evidence Act, 1938, s. 1, sub-s. 1: " In any civil proceedings where " direct oral evidence of a fact would " be admissible, any statement made " by a person in a document and " tending to establish that fact shall, " on production of the original document, be admissible as evidence of " that fact if the following conditions " are satisfied, that is to say—(i) if " the maker of the statement either— " (*a*) had personal knowledge of the " matters dealt with by the statement; . . . and (ii) if the maker of " the statement is called as a witness " in the proceedings ", with the proviso that the second condition need not be satisfied if, among other things, the maker of the statement is dead.

Sub-s. 3: " Nothing in this section " shall render admissible as evidence " any statement made by a person " interested at a time when proceedings were pending or anticipated " involving a dispute as to any fact " which the statement might tend to " establish ".

Section 2, sub-s. 1: " In estimating the weight, if any, to be " attached to a statement rendered was inadmissible. "Anticipated" in sub-s. 3 means "regarded "as probable". When the statement was signed it was with a view to securing compensation under the Workmen's Compensation Act, 1925. It is clear from the workman's answers to the questions on the form that he blamed no one for the accident and did not think he had any claim apart from that under the Act of 1925.

Humfrey Edmunds for the defendants. It is submitted that when this statement was signed proceedings were "anticipated" within the meaning of sub-s. 3. Proceedings were anticipated by the society, who sent the workman the form for him to fill up, even if they were not anticipated by him. The proceedings need not have been anticipated by the workman, if they were anticipated by the society. That would be sufficient to render the statement inadmissible. It is submitted that the court should approach the construction of the Evidence Act, 1938, from a conservative angle. The Act introduces a serious innovation into our law, since it lets in unsworn evidence which cannot be the subject of cross-examination. In admitting such evidence, the intention must have been that the person who gave it was when he gave it free from any bias.

When this statement was made proceedings must have been anticipated, for there were then two possible claims open to the workman: he could claim under the Workmen's Compensation Act, 1925, or he could sue for damages for negligence. He certainly contemplated proceedings under the Act of 1925. He was accordingly biased when the statement was made, and the court should be astute to exclude the statement of any person who is biased. In no circumstances should the statement of an interested party be admitted. [He referred to *Robinson* v. *Stern* (2).]

EVERSHED, M.R. This appeal has involved a question of interest and importance on the effect of the Evidence Act, 1938. [His Lordship stated the facts and continued]:—A question of difficulty confronts the plaintiff, because, in order to succeed, it is plain that she must prove how the accident occurred, and the

"admissible as evidence by this Act, "regard shall be had to all the circumstances from which any inference can reasonably be drawn as to "the accuracy or otherwise of the "statement, and in particular to the "question whether or not . . . the "maker of the statement had any "incentive to conceal or misrepresent "facts".

(2) [1939] 2 K. B. 260.

present application is made to assist her to do that. She seeks now—and the matter has come before the court at an interlocutory stage, which is clearly in this case a convenient course—to have an order admitting, subject to the terms of the Act of 1938, the form which the workman signed on November 11, 1947. It is contended that the form is a statement within the scope of s. 1 of the Act, and not excluded by sub-s. 3. In particular it is in this case said that it is not so excluded on the ground that when the statement was made proceedings were pending, or "anticipated", involving a dispute as to any facts which the statement might tend to establish; and the short question which this court has to determine is whether in truth proceedings were "anticipated" of the character named in the sub-section at the time when the statement was made.

As a general premise to his argument, Mr. Edmunds pointed out to us that the Evidence Act, 1938, might be regarded as a serious innovation, and that the court should therefore be astute to see that only such documents are to be admitted in pursuance of it as were, as he said, "free, so far as could be possible, from "every risk of bias". Mr. Edmunds referred to the words of Goddard, L.J., in *Robinson* v. *Stern* (3), where the Lord Justice referred to the well-known statement of Lord Eldon, L.C., in *Whitelocke* v. *Baker* (4), in regard to the admission of documentary evidence that such documents are "admitted upon the "principle, that they are the natural effusions of a party, who "must know the truth; and who speaks upon an occasion, when "his mind stands in an even position, without any temptation "to exceed or fall short of the truth".

On those grounds Mr. Edmunds has asked us in effect to give a somewhat cautious, if not narrow, effect to the enabling provisions of this Act. For myself, I am unable to accept that premise. When income tax was first by statute introduced into this country it would, no doubt, have been regarded as a serious innovation; but it does not seem to me to be the duty or the function of this court on that account to give the construction of a statute other than the ordinary and proper meaning of the language which Parliament sees fit to use.

Section 2, sub-s. 1, shows clearly that the legislature must have contemplated that under this Act documents might be properly admissible which did not have that impartiality to which Lord Eldon, L.C., alluded. Therefore it was emphatic in stating that admission was one thing, but that the weight to be attached to the document when admitted was another. Parliament, no doubt, was content to rely on the experience of the judges not to give to a document, which might in a measure be tendentious, any more weight than it deserved.

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(3) [1939] 2 K. B. 260, 268.

(4) (1807) 13 Ves. 511, 514.

Therefore, I think that this matter must be determined according to the ordinary sense of sub-s. 3 of s. 1, and by asking the question whether it can be said that at the time when this form was filled up proceedings were anticipated involving a dispute as to any fact which it might tend to establish.

There has been a number of cases before the court raising the different question whether the maker of the statement should be regarded as interested. No such question arises here. Beyond a peradventure, the deceased was interested when he made the statement. *Robinson* v. *Stern* (5) is the only authority which has been brought to our attention where the question was whether proceedings were anticipated within the meaning of sub-s. 3 so as to disqualify the document tendered as evidence.

The judge, affirming the master, thought that an affirmative answer should be given to that essential question, and therefore excluded the document. With all respect to him, I have come to a different conclusion. As an ordinary matter of English, it seems to me, putting it for the moment quite generally and broadly, that, when this form was signed, that is to say, when the statement was made by the workman, proceedings were not anticipated either by himself or by anybody else involving a dispute as to any facts which the statement might tend to establish. Proceedings in a case of this character may, obviously, be of more than one kind. Proceedings might in such a case be anticipated if it were thought that a claim might arise and be disputed for liability at common law, or under contract. That is one class of case, and those are the proceedings which, in fact, are now pending in this action.

Another and different class of proceedings might be proceedings to enforce the right of the workman under the Workmen's Compensation Act, 1925. No such proceedings have been brought, but clearly the form was filled in so as to support a claim for compensation under that Act. Plainly, in all such cases where that essential question is put to the court, the court has to answer at a later date what was the state of mind of the relevant person at an earlier date, namely, when the statement was made.

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(5) [1939] 2 K. B. 260.

All that I have said leads to the pertinent observation that the court is entitled to come to its conclusion on the facts as they were on the past date, paying due regard, though not more than due regard, to the facts as they have subsequently occurred, since —particularly, by way of example, if it appears afterwards that the claim was from the start a perfectly genuine claim—they may then throw some light upon the problem whether proceedings were anticipated when that claim, now known to be genuine, was originally made.

With regard to the meaning of the expression "proceedings "were anticipated", the liking which many persons appear to have for the use of words having twice as many syllables as the more natural and proper word to use has, in fairly recent times, undoubtedly led to the use of the word "anticipate" when the correct word is "expect". It is known to all of us that in ordinary conversation the word "anticipate" is used as meaning "expect". For example, a man will say, or will more often write, "I anticipate having the pleasure of meeting you next "Tuesday", when he means more briefly and more appropriately, "I shall see you next Tuesday", or perhaps a little more fulsomely, "I expect to see you next Tuesday".

According to the Shorter Oxford English Dictionary, the modern use of this word "anticipate" (for it can no longer be regarded as misuse of the word) signifies "to look for an uncertain "event as certain". The example given is: "Those not in the "secret anticipated an acquittal". If that is the meaning of the word, then when the sub-section says "proceedings were "anticipated" it should mean "proceedings were regarded as "certain".

I think, however (particularly in view of the observations of this court in *Robinson* v. *Stern* (6)), that that is now too narrow a meaning to give to this word. I suppose it is the worst of misusing, or of giving a new use to, a word that it is a very long time before the misuse, or new use, acquires a precise significance. I am prepared for my part to accept the view, for which some authority is to be found in *Robinson* v. *Stern* (6), that by "proceedings were anticipated" is meant "proceedings "were regarded as likely", or even, if you will, "reasonably "probable".

Even so, however, and giving so much latitude in Mr. Edmunds' favour, I do not think that the test was here satisfied.

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(6) [1939] 2 K. B. 260.

The form was supplied by the approved society to the workman to enable him to formulate the claim which, if what he was saying was true, he had as of right against his employers. It was a printed form, and it asked the questions that would have to be asked—the nature of the injury, when and where it occurred. Question No. 4 was: " (a) Describe fully the acci-" dent, and what you were doing at the time. (b) Whether the " same occurred during your employment. (c) Names and " addresses of witnesses "; and under that in parentheses " (It " is of the utmost importance to give names and addresses of " witnesses.)".

To that the workman put: " (a) Caught heel of boot in stump " of post whilst emptying barrow. (b) Yes "—that is to say, it occurred during his employment; and " (c) Working alone ".

To the question: " Names and addresses of person or persons " you blame for the accident . . . and why?" the deceased answered " None "; and let me say at once that by that answer, as far as I can see on the facts of this particular case, it becomes quite impossible to say that he, or anybody else, thought likely, or even possible, proceedings at common law for negligence against some third party.

Question No. 11 asks: " (a) Have you taken proceedings to " enforce your claim? If so, give name and address of solicitor " or trade union acting for you "—answer " No ". " (b) If not, " please state the name and address of any solicitor you propose " to instruct "—answer again " No ", which I take to mean, " I " do not propose to instruct any solicitor to make a claim, or to " take proceedings to enforce the claim ". " (c) If none, do you " authorize the society to give notice of your accident, and claim " compensation on your behalf? If not, give reason for refusal " —answer " Yes ". Then at the end there is a statement that the society reserve the right to decline to act on any authority given; and there is this declaration signed by the workman which made the document his statement: " I declare that the fore-" going particulars are true in every respect, and I have made " full disclosure of all material facts ".

Having regard to the contents and the nature of the document, can it be said, using English in its ordinary sense, that proceedings were regarded as likely, or reasonably probable, by the workman, or by anybody else, involving a dispute as to any fact which the statement might tend to establish at the time when that statement was made? Applying the ordinary standards of common sense, I think that the answer is No. Whether the proceedings would have to be "anticipated" by the person making the statement, or by other persons, it is not necessary to consider in this case. If they were not so anticipated by the workman, it is a little difficult to see by whom else they could have been anticipated in this case, but I state again that, in my judgment, they were "anticipated" within the meaning of the sub-section by nobody at all when that statement was made.

Robinson v. *Stern* (7) deserves a little closer attention. There the defendant had had the misfortune to injure seriously a small boy by knocking him down with her motor car. After that accident she made at the suggestion, according to her, of a police constable who appeared on the scene, a statement at the police station. The statement is fully set out in the report (8). It opens, as these statements normally do, with a declaration that she has received a caution commonly given, and that caution includes: "That whatever you may say will be taken down in "writing and may be given in evidence".

At a later stage proceedings were brought against her on the ground that the accident was her responsibility, and the question arose—she was, of course, still alive—whether that statement could not be put in under s. 1, sub-s. 1, of the Act of 1938. The judge had admitted it, and since, as he said, the document influenced him in favour of the defendant, he came to a conclusion in the action against the plaintiff's claim.

On appeal, the question was whether that document, on which the judge admittedly founded himself, ought to have been admitted. This court held not; but, to my mind, it is plain that on the facts of that case the court, and particularly the majority, Scott and Clauson, L.JJ., came to their conclusion on the ground that, in the circumstances, in Scott, L.J.'s words (9): "The "contention for the defendant that proceedings were not antici-"pated is unarguable". Later he said: "I am inclined to think "that the word 'anticipated' should be construed as including "'likely'; but even assuming that it should be given the inter-"pretation of 'anticipated by the person making the statement', "in my view it is impossible to contend that the defendant did "not anticipate proceedings, having regard to the facts of the "case and the internal evidence of the statement itself, with its "initial questions and statements, . . .".

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(7) [1939] 2 K. B. 260.
(8) Ibid. 265.
(9) Ibid. 266.

Clauson, L.J., said (10): "I think her answer"—that was an answer to a question put by the learned judge in the court that she had not thought about proceedings at the moment when the constable invited her to the station—"was almost certainly "entirely true; but when she gets to the police station and has "time for reflection she makes a statement which, to my mind, "could not possibly have been made by anyone who had not "present to their mind the possibility, at least, of proceedings of "some character".

If Clauson, L.J., thought that "anticipate" means having present to your mind the mere possibility of proceedings, I am not sure that I am prepared, as at present advised, to go as far as he did in that passage; but I think that the ratio decidendi of that case is plainly this: when a street accident occurs, as all the world knows, proceedings are, to say the least, likely. I put the question to Mr. Edmunds, and he answered me that with his experience he would say that in such circumstances anyone today would state that the odds on proceedings of some sort being taken were very long indeed. The reference to the statement made being given in evidence emphasizes the same point, i.e., that this is something which will be liable to be used, could be used in proceedings, and, indeed, which could, in a sense, serve hardly any other purpose than to be so used.

The present case seems to be essentially of a wholly different character: a claim under the Workmen's Compensation Act, 1925, was in the nature of an insurance claim. The statement here made is fairly comparable to the sort of form an insured person fills in in the ordinary way when he is going to make a claim on his insurer. A man suffers, say, a loss by burglary, and he fills in a form and sends it to his insurers stating that he has had the loss, specifying it and making his claim. Particularly where, as is found to be the fact here, it is a perfectly genuine claim, it seems to me beyond reason to suggest that everyone who puts forward such a claim must be taken to be "anticipating" proceedings of the character specified when he makes the statement. I therefore, treating this case, as all cases in this court must be treated, as falling to be determined according to its particular facts, and paying regard to the particular form of the notice, think that it is wholly distinct on its facts from *Robinson* v. *Stern* (11). I do not forget the passages in the parts of the form which refer to addresses of witnesses and to the instructing of solicitors, but, reading the document as a whole, with all the answers as they were given, I cannot myself conclude from the fact that those questions were asked, and still less from the answers which were given to them, that the workman, or the society, or anybody else, could possibly be said to have "anticipated" proceedings when the statement was made.

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(10) [1939] 2 K. B. 260, 268.

(11) [1939] 2 K. B. 260.

For these reasons, and with all respect to McNair, J., I think that this appeal should be allowed, and that this document is, subject, of course, to the other conditions of the Act, admissible.

DENNING, L.J. I agree. In order to exclude this document, it is not sufficient for the defendants to say that proceedings might have been anticipated, or ought to have been anticipated. They must go further and show that proceedings "were anticipated"; that is, were in fact anticipated. Anticipation is a state of mind whereby someone considers that something is likely to happen. There must be a likelihood of them. Someone must consider it likely that proceedings will take place; and that someone must ordinarily be the person who makes the statement; for it is his state of mind which is material. His statement is to be excluded, if he is a person interested and makes it with a view to proceedings. If his state of mind is such that he says to himself "it looks to me as if this will end up in court; I must be "careful what I say", then proceedings are anticipated and the statement is inadmissible. But if his state of mind is such that he only says to himself "I do not know whether this will end up "in court or not; it may or may not do so, but I am not going "to anticipate that it will; I will give my version for what it is "worth", then proceedings are not anticipated, and the statement is admissible.

In support of this view, I would mention that the words "pending" or "anticipated" are the words habitually used in connexion with legal professional privilege. That privilege only obtains if litigation is "pending or anticipated"; and in that connexion it is well settled that a mere vague apprehension of litigation generally is not sufficient: see The Annual Practice (1950), p. 499. *Robinson* v. *Stern* (12) is clearly distinguishable, because, once a person has been cautioned by the police, he must be taken to know that the matter may end in court. The caution tells him so.

(12) [1939] 2 K. B. 260.

Mr. Edmunds urged that we should give a restrictive interpretation to this Act. I agree with my Lord that that would be a wrong approach. I think that it should be given a liberal interpretation. The admission of signed statements can effect a great saving of costs, especially in cases where there is no reason to doubt the truth of what they contain, and there is no need for cross-examination. Even in cases where one party or the other disputes the accuracy of a signed statement, it can be of great value, because it may enable justice to be done which might otherwise fail for want of evidence, as when the person who made the statement is dead. Signed statements are also very valuable in accident cases when they are taken shortly after the accident, because they form a contemporary record made while the facts were still in the mind of the witness, and enable the court to check his subsequent recollection.

In the course of the argument, I asked whether a statement made after an accident by a party to the police is admissible, not only in cross-examination, or as an admission, but also in support of the party's present evidence. I say nothing about that, because it does not arise here. I do not wish it to be supposed that I think it inadmissible, if it was made at a time when proceedings were not anticipated.

I agree that the appeal should be allowed.

HODSON, L.J. The question is whether the statement was made by a person interested at the time when proceedings were anticipated. There is no dispute that the statement was made by a person interested, and the difficulty is to decide exactly what is meant by the word " anticipated ". I think it right to accept the meaning put upon that word by Scott, L.J., in *Robinson* v. *Stern* (13), when he said that he was inclined to think the word " anticipated " should be construed as including " likely ". Translating the word " anticipated " into " likely ", I think, for the reasons which have already been given, that this statement is admissible on the footing that proceedings were not likely at the time when the statement came into existence, which is the time to which attention has been directed. In my judgment, the appeal should be allowed.

Appeal allowed.

Solicitors: *Leonard Kasler; Hewitt, Woollacott & Chown.*

(13) [1939] 2 K. B. 260, 266.

C. A.

1951
July 12.

Evershed, M.R., Jenkins and Birkett, L.JJ.

WILLIAMS *v.* PORTMAN (VISCOUNT).

Landlord and tenant—Sub-lease of premises by tenant—Resumption by tenant of possession of premises by arrangement with sub-tenant and before end of sub-tenancy—Sub-tenant not a "predecessor in "title" of tenant—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36) *s.* 4, *sub-s.* 1; *s.* 25, *sub-s.* 1.

A tenant, who had been granted a lease for six years of premises which he equipped for the purpose of carrying on a jeweller's business, within a month of the granting of the lease to himself, granted a sub-tenancy for a year, with an option for a further year, to a sub-tenant, who proceeded to carry on his own business as a jeweller on the premises. The option was exercised, but three months after the beginning of the second year of the sub-tenancy, in pursuance of an agreement made between the parties, the sub-tenant quitted the premises and the tenant resumed possession of them and thereafter carried on the business of a jeweller on them. In due course he took the necessary steps to obtain the grant of a new lease or alternatively compensation under the Landlord and Tenant Act, 1927, maintaining that the business of a jeweller had been carried on on the premises by him or his predecessor in title for a period of more than five years.

Held, that when the tenant resumed possession of the premises on the termination of the sub-tenancy, he did so exclusively by virtue of his right to possession under the lease which had been granted to him and not at all through or in consequence of the sub-tenancy which he himself had granted. He, therefore, derived no title at all from the sub-tenant and consequently the sub-tenant was not his predecessor in title within the meaning of ss. 4 and 25, of the Landlord and Tenant Act, 1927, and he, therefore, failed to qualify for a claim under the Act.

Lawrence v. *Sinclair* [1949] 2 K. B. 77 considered.
Butlins Ld. v. *Fytche* [1948] 1 All E. R. 737 distinguished.

APPEAL from Judge Bensley Wells, sitting at Marylebone county court.

On March 25, 1945, one Peddie granted to the tenant a lease of certain premises for six years. The tenant wished to carry on the business of a watchmaker and jeweller at the premises and began to prepare them for the reception of that business. He was, however, taken ill and, on April 17, 1945, granted a sub-tenancy of the premises furnished (i.e., set up and equipped to carry on a jeweller's business) for one year. The sub-tenant neither took over the tenant's stock nor acquired his goodwill. The sub-tenant's business, although that of a watchmaker and jeweller, was distinct from that of the tenant. The sub-tenant was given, and exercised, an option to continue the sub-tenancy for a further year. The tenant's health improved and he assisted the sub-tenant in conducting the business. Eventually, on July 10, 1946, in fulfilment of promises which had been exchanged, the tenant and sub-tenant agreed that the latter, notwithstanding his exercise of the option, should then and there go out, taking with him his stock and all the paraphernalia of his business, and that the tenant should realize his original intention and himself set up and carry on his own watchmaking and jewellery business. As compensation to the sub-tenant for having to go out at such short notice, the tenant paid him 650*l*.

The effect of that transaction was that the sub-tenant surrendered to the tenant all his interest in and right to possession of the premises. There was no suggestion that he assigned to the tenant the unexpired portion of the term. The arrangement made, and the intention, was that the sub-tenant's interest under the sub-tenancy should cease and determine. The tenant then entered into possession by virtue of his right to possession under the lease of March 25, 1945. He carried on his business and, in due course, as the expiry of the lease approached, he took the necessary steps to enable him to obtain compensation, or, alternatively, the grant of a new lease under the Landlord and Tenant Act, 1927 (1).

By notice dated March 15, 1950, the tenant gave notice to his immediate landlord (an assignee from Peddie) alleging that the sum which could be awarded to him under s. 4 of the Landlord and Tenant Act, 1927, as compensation for loss of goodwill attaching to the premises would not compensate him for the loss of goodwill which he would suffer if he removed to and carried on his trade or business on other premises. In lieu of compensation he required a new lease to be granted to him. In the alternative, he claimed 3,025*l.* as compensation for loss of goodwill and by reason of the fact that, as a result of his carrying on the trade or business for five years, the premises could be let at a higher rent than they would have realized had no such goodwill attached to them. On March 16, 1950, the mesne landlord gave notice to the head landlord that he had received the notice of March 15.

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(1) Landlord and Tenant Act, 1927, s. 4, sub-s. 1: "The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner . . . be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years, goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realized had no such goodwill attached thereto . . .".

Section 25, sub-s. 1: "For the purposes of this Act, unless the context otherwise requires—the expression 'tenant' means any person entitled in possession to the holding under any contract of tenancy, whether the interest of such tenant was acquired by original contract, assignment, operation of law or otherwise . . .".

"The expression 'predecessor in 'title' in relation to a tenant or landlord means any person through whom the tenant or landlord has derived title, whether by assignment, by will, by intestacy, or by operation of law".

By originating application dated June 20, 1950, the tenant applied to Marylebone county court for the grant of a new lease. The application was under s. 5 of the Landlord and Tenant Act, 1927, and in it the tenant alleged that the amount of compensation to which he would have been entitled under s. 4 was 3,025*l.* By his answer dated August 2, 1950, the mesne landlord answered, among other things, that he held the premises of the head landlord as his tenant under a lease expiring on March 25, 1951, and that he had served a copy of the tenant's notice on the head landlord.

By order of the court dated August 29, 1950, the head landlord was added as a party to the proceedings. By his answer dated September 20, 1950, the head landlord did not admit that the statutory requirement of five years' trading was satisfied, and raised other points not material to this report.

At the beginning of the hearing before the referee the mesne landlord was dismissed from the suit. The referee took the view that the sub-tenant was a predecessor in title of the tenant. The county court judge, however, held that he was not; that the tenant did not, as had been contended, derive title through the sub-tenant by operation of law; and that the tenant had failed to show five years' trading by himself or by his predecessor in title; and he dismissed the application. The tenant appealed.

H. Vester for the tenant. The tenant can aggregate to make up the trading "for a period of not less than five years" required by s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927, which period need not be under one tenancy: see *Lawrence* v. *Sinclair* and observations in the judgment of Asquith, L.J. (2). In the present case it was not under one tenancy; for the sub-tenant derived title from the tenant who, in his turn, derived title from the sub-tenant.

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(2) [1949] 2 K. B. 77, 85.

As to deriving title "by operation of law", the same expression occurs in s. 53, sub-s. 1 (*a*), of the Law of Property Act, 1925, and in s. 3 of the Statute of Frauds. In Wolstenholme and Cherry's Conveyancing Statutes (12th ed. 1932), vol. i, at p. 320, is the following note: "Delivery of possession by a tenant to "his landlord, and acceptance by the landlord, is a surrender by "operation of law: *Gray* v. *Owen* (3); 18 Halsbury's Laws of "England, 548". In the present case there has been an operation of law, because the sub-tenant agreed to go out and did go out. [He referred to *Wallis* v. *Hands* (4) and observations of Chitty, J. (5).]

Also, the word "assignment", which is in the same concatenation as the expression "operation of law", is a general word covering any form of conveyance.

If—which is not admitted on behalf of the tenant—"operation "of law" must be something quite other than "contract" or "assignment", it must be something which the person affected by it (here, the tenant) does not bring about by deed or other instrument, or by any act in the nature of a contract or assignment. On that footing, adjudication in bankruptcy is an "operation of law"; but that is not what is contemplated by s. 25, sub-s. 1.

Certainly, whatever there may have been, there has not been a merger in the present case. It was not the intention of the tenant and the sub-tenant that there should be, and it is not in the tenant's interest that merger should take place. Therefore it does not take place: *Snow* v. *Boycott* (6); *Ex parte Whitbread* (7).

A tenant can "carry on business" by means of a sub-tenancy, i.e., by putting in a sub-tenant: *Butlins Ld.* v. *Fytche* (8). True, in the present case, the tenant did not "carry on business" by putting the sub-tenant in, because the business which the sub-tenant carried on was entirely his own; but the effect of granting the sub-lease was ". . . that business . . ." either by the tenant or by the sub-tenant, was carried on "for a period of "not less than five years" by the tenant or his predecessor in title. The decision of the county court judge was wrong and the appeal should be allowed.

L. A. Blundell for the head landlord. The referee was wrong in holding that the sub-tenant was a predecessor in title of the tenant. Certainly there was a surrender of the sub-tenancy to

(3) [1910] 1 K. B. 622.
(4) [1892] 2 Ch. 75.
(5) Ibid. 82.
(6) [1892] 3 Ch. 110.
(7) (1841) 2 M. D. & De G. 415.
(8) [1948] 1 All E. R. 737.

the tenant; but the tenant did not thus become entitled in possession to the holding "by operation of law".

Adjudication in bankruptcy may well be one of the things contemplated by s. 25, sub-s. 1, as an "operation of law". For example, disclaimer of a lease under the bankruptcy legislation has the same effect as a surrender (*Ex parte Hart Dyke* (9)), and in such a case the trustee in bankruptcy may wish to get all possible benefit of any compensation to which he may be entitled.

The tenant's title to be in possession of the holding is, and always was, derived from his own lease. Out of that lease he created a derivative interest which deprived him of the right to immediate possession; but when that derivative interest is ended, his right to be in possession is still derived from his own lease. The county court judge's decision should be upheld, and the appeal dismissed.

EVERSHED, M.R. This appeal raises the question whether the expression "or his predecessors in title" in s. 4, sub-s. 1, of the Landlord and Tenant Act, 1927, helps a tenant who sublets premises to a sub-tenant and later, by arrangement with the sub-tenant and before the end of the sub-tenancy, resumes possession of the premises. The case is, I think, a little hard for the tenant, and Mr. Vester has battled most valiantly for him; but I have been unable to see any answer to the conclusion at which the county court judge arrived. It may well be (and, I think, this is not said for the first time) that the language selected in s. 4 was not entirely happy, seeing that the subject-matter with which Parliament was dealing was compensation for goodwill attached to premises as the result of the carrying on at the premises of a particular business for a particular period of time. It is obvious that emphasis might appropriately have been directed to the interest in the business rather than the title to the property; but, whatever might have been done, Parliament chose language which this court must construe to the best of its ability.

[His Lordship then stated the facts, substantially as above set out, read the relevant sections of the Act, and continued:] If the simple question were put and it was to be answered without considering extraneous circumstances or references to other legislation, I do not think that any one would be inclined to say that a tenant who has granted a sub-tenancy and then, as the result of an arrangement determining it, has resumed possession, has derived his title at any time, for any purpose or in any respect from the sub-tenancy. Mr. Vester, however, has considerably emphasized the very last few words of the definition "or by "operation of law". He says that is a term of art, hallowed by usage with reference to real property, and has a particular significance in the consideration of surrender, which may take place by deed or by operation of law.

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(9) (1882) 22 Ch. D. 410.

The simplest example of surrender by operation of law is where a tenant has gone out of possession in circumstances from which the obvious inference is that the relation of tenant and landlord is to be regarded as terminated. From that Mr. Vester seeks to infer that the reference to "operation of law" must comprehend, at any rate, a case where a tenant had resumed a right to possession (with which he had formerly parted consequent on a sub-lease) as a result of a surrender by operation of law. The argument is ingenious, but in my judgment cannot be supported. It may be a criticism that content can be given to the phrase "or by operation of law" only by considering bankruptcy; and that is said to be an unlikely conception with regard to the tenant in circumstances such as these. But I am not satisfied that it is so unlikely. As Mr. Blundell pointed out, a trustee in bankruptcy might be very much concerned to get the benefit of any compensation to which the Act entitled him; and it must not be forgotten that the expression "predecessors in title" is to be found in relation not merely to a tenant but also to a landlord. However that may be, I think the matter is really concluded if the definition of "tenant" and of "predecessor in title" be read together. I have read the former, and I will read the latter, substituting for the word "tenant" the definition which has already been given, thus: "The expression 'predecessor in title' in relation "to any person entitled in possession to the holding under any "contract of tenancy . . . means any person through whom that "individual has derived title . . .". When the definition is so read, it becomes plain that, so far as concerns the present case, the tenant cannot qualify for the compensation because the sub-tenant was not his predecessor in title. No doubt, where third parties are concerned, a surrender may not for all purposes wholly extinguish the term surrendered; but, in the present case, what occurred in July, 1946, inevitably wholly put an end to the sub-term subsisting between the tenant and the sub-tenant so that the tenant, when he resumed possession, did so by virtue, and exclusively by virtue, of his right to possession under the lease which Peddie had granted to him, and not at all through or in consequence of the sub-tenancy which he himself had granted. Thus, the sub-tenant cannot have been his predecessor in title within s. 4, sub-s. 1.

What I have said in no way runs counter to anything said in *Lawrence* v. *Sinclair* (10). If it could have been shown that the sub-tenant was the predecessor in title, the tenant could undoubtedly have aggregated any rights which he had acquired directly under his own lease with any rights of possession which he had acquired derivatively from the sub-tenant; but unless the sub-tenant was a predecessor in title, and unless the tenant's own rights to possession were partly constituted by the right directly derived from his own contract and partly out of the sub-tenant's contract, no question such as that which arose in *Lawrence* v. *Sinclair* (10) could arise for determination here.

One other point Mr. Vester took, based on *Butlins Ld.* v. *Fytche* (11). In that case no question of " predecessors in title " arose. A claim was made by Butlins Ld., a company carrying on the business of amusement parks. It appears from the report (though the facts are somewhat obscure) that as to some items in the amusement park, some side-shows and like matters, another party, Sussex Amusements Ld., a wholly owned subsidiary of Butlins, was given the right to run them, either as licensees or as sub-lessees of Butlins. But, as was observed in the judgment of this court, the business all along was that of Butlins, theirs was the controlling genius, theirs the lay-out and scheme of the premises; and the part played by the licensees or sub-lessees, whichever they were, was really subsidiary both in responsibility and content. In those circumstances it was said that the business was Butlins'; they had carried it on and they had been the lessees of the whole premises for the requisite time.

If it could have been said that the sub-tenant, during his short period of sub-tenancy, was carrying on the tenant's business on the tenant's behalf, it may well be that the tenant would not be deprived of his right merely because, as part of the mechanics of the arrangement, a sub-tenancy had been granted. That consideration, however, does not arise and I have already said that the sub-tenant's business was wholly distinct from that of the tenant. He was not in any sense carrying on the business as an agent. In those circumstances I think that *Butlins Ld.* v. *Fytche* (11) is of no avail to the tenant.

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(10) [1949] 2 K. B. 77.

(11) [1948] 1 All E. R. 737.

C. A.
1951

Williams
v.
Portman
(Viscount).

For these reasons I conclude that the decision of the county court judge was right, and that accordingly this appeal fails and should be dismissed.

Jenkins, L.J. I agree.

Birkett, L.J. I agree. A great many points were discussed in this case, some of difficulty and complexity, but after listening to the discussion of all those points, for my own part I think there is one short answer to the question which determines this case. It was seen at all times to be necessary to the success of the tenant under the Landlord and Tenant Act, 1927, that in some way or other the sub-tenant should be found to be a predecessor in title of the tenant within the meaning of s. 4 and s. 25 of the Act. The perseverance and ingenuity of Mr. Vester have been largely directed to that matter.

The referee in this case found that the sub-tenant was in fact a predecessor in title. The county court judge in his turn took the contrary view. For my own part I think that the true answer to the question is the answer which the county court judge made, that on all the facts in this case the sub-tenant could not be termed a predecessor in title. The tenant had at all times material to this case a lease which was dated March 25, 1945, for the period of six years. True, the matter was a little complicated by the fact that the tenant sub-let the premises to the sub-tenant, with an option for a further year; but the moment that the year and three months of the sub-tenant's occupancy came to an end pursuant to the arrangement made, the tenant resumed his occupation, in no sense because the sub-tenant had been his predecessor in title, but at all times because of the subsisting lease of March 25, 1945, which was still in operation at that time.

Appeal dismissed.

Solicitors: *Bulcraig & Davis; Wilde, Sapte & Co.*

K. R. A. H.

1951
July 23.

Devlin, J.

TRAVIS *v.* MINISTER OF LOCAL GOVERNMENT AND PLANNING AND ANOTHER.

Town and Country Planning—Powers of Central Land Board—Land offered for sale at more than existing use value—Withdrawal of offer—Compulsory purchase order—Planning permission granted after order and before confirmation—"Development for which permission has been granted"—Validity of compulsory purchase order and confirmation—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sch. I, para.* 15—*Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 43.

A person who wished to purchase a certain piece of another's land as he considered it suitable for the erection of a house, approached the landowner and was offered the plot he desired for 192*l.* The prospective purchaser thought that this price was excessive, and he communicated with the Central Land Board. The board considered that the existing use value of the land in question was 30*l.* and they decided to exercise their powers under s. 43 of the Town and Country Planning Act, 1947. They accordingly wrote to the owner's agents asking if the owner would be prepared to sell the land by agreement, but they were informed that the owner had withdrawn the whole of his estate from sale. The board passed a resolution that it was desirable to acquire the land for the purpose of disposing of it for development for which planning permission had been granted, and on July 17, 1950, they made a compulsory purchase order in respect of it and submitted the order to the Minister for confirmation. The local authority granted planning permission on September 25, 1950, and the Minister, after holding an inquiry, confirmed the board's order on January 24, 1951.

The landowner thereupon applied under para. 15 of Sch. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, to have the compulsory purchase order and the confirmation order quashed on the ground that they were both bad in law and ultra vires since permission for the development of the land had not been granted at the date of the compulsory purchase order and, further, that they were made to secure an object which it was not within the powers of the board to achieve—namely, to enforce their policy that land, and in particular the land comprised in the orders, should only be sold at a price based on existing use value, and/or to encourage or promote or assist its development.

Held, (1.) that, even assuming that the planning permission must be granted at the time of acquisition, the applicant had failed to show that permission had not been granted at the time of acquisition, as the compulsory purchase order was not and could not be the acquisition of the land: it was no more than a draft which was submitted to the Minister for his consideration and confirmation, and even when confirmed it had no legal effect, but merely authorized the board to acquire the land; that s. 43 meant no more than that at the time of acquisition the board might not acquire the land unless permission had by that time been granted; and

(2.) that as it was conceded that the effect of the decision in *Earl Fitzwilliam's Wentworth Estates Co. Ld.* v. *Minister of Town and Country Planning and Another*, ante, 284, was that the board might exercise their powers in order to prevent sales of land at more than its existing use value, it followed that they might intervene before the sale was complete, for it would be idle to do so afterwards; that, accordingly, when there had been an offer for sale the board were entitled to use their powers under s. 43 to prevent a sale at more than the existing use value of the land, and the withdrawal of the offer did not affect the board's jurisdiction but merely was a matter for their discretion; and that therefore the application should be dismissed.

Earl Fitzwilliam's Wentworth Estates Co. Ld. v. *Minister of Town and Country Planning and Another*, supra, applied.

APPLICATION under para. 15 of Sch. I to the Acquisition of Land (Authorisation Procedure) Act, 1946 (1).

The applicant owned land in Romiley Park Estate, Cheshire, some of which had been developed, some of which was ripe for development, and the rest of which had never been developed. Another person considered that a certain piece of the applicant's land would be suitable for the erection of a house and he wished to purchase it, and he thought that he would be able to obtain the necessary planning permission and licence. He accordingly wrote to the applicant's agents in August, 1949, and was informed by them that the price of the land in question would be about 192*l*. That other person considered that price excessive and

(1) Acquisition of Land (Authorisation Procedure) Act, 1946, Sch. I, para. 15: " If any person aggrieved " by a compulsory purchase order " desires to question the validity " thereof, or of any provision con- " tained therein, on the ground that " the authorisation of a compulsory " purchase thereby granted is not " empowered to be granted under this " Act . . . he may . . . make an " application to the High Court, and " on any such application the court " shall have powers which include the quashing of the order.

Town and Country Planning Act, 1947, s. 43, sub-s. 1: " The Central " Land Board may, with the approval " of the Minister, by agreement ac- " quire land for any purpose connected " with the performance of their func- " tions under the following provisions " of this Act, and in particular may " so acquire any land for the purpose " of disposing of it for development " for which permission has been " granted under Part III of this Act " on terms inclusive of any develop- " ment charge payable under those " provisions in respect of that develop- " ment ".

Sub-s. 2: " If the Minister is satis- " fied that it is expedient in the public " interest that the Board should ac- " quire any land for any such purpose " as aforesaid, and that the Board " are unable to acquire the land by " agreement on reasonable terms, he " may authorise the Board to acquire " the land compulsorily in accordance " with the provisions of this section ".

communicated with the second respondents, the Central Land Board, a body constituted under the Town and Country Planning Act, 1947, whose main function is to collect the development charges which the Act of 1947 imposed on the development of land. It is part of the board's policy to use a power which they have under s. 43 of the Act of 1947 to acquire land in order to prevent the sale of land at more than the existing use value. The purchaser who buys at the existing use value and then wants to develop the land for some other purpose will have to pay a development charge, and the board considers that it will impede their collection of that charge if the purchaser is in effect required to pay twice over, first by paying a price for the land which is more than the existing use value, and then the development charge for the right to develop.

The board considered that the existing use value of the applicant's land was 30*l*. as compared with the 192*l*. which the applicant was prepared to accept for it, and they decided to exercise their powers under s. 43 of the Act of 1947. Accordingly, on April 6, 1950, the district valuer wrote to the applicant's agents asking if their client was prepared to sell the land by agreement. The agents replied, on April 18, that the applicant had withdrawn the whole of his estate from sale.

On June 9, 1950, the board resolved that it was desirable to acquire the land in question for the purpose of disposing of it for development, for which planning permission had been granted, and that as they were unable to acquire it by agreement on reasonable terms, they had decided to acquire it by compulsory purchase. The compulsory purchase order was made on July 17, 1950, and was submitted to the Minister for confirmation. The local authority granted planning permission on September 25, 1950, and the Minister confirmed the order on January 24, 1951.

The applicant moved the court to quash the compulsory purchase order made by the Central Land Board, and the compulsory purchase confirmation order made by the Minister of Town and Country Planning (now the Minister of Local Government and Planning).

The grounds of his application were that both orders were bad in law and ultra vires in that on July 17, 1950, permission for development of the land comprised in the orders had not been granted under Pt. III of the Town and Country Planning Act, 1947, as provided by s. 43, sub-s. 1, of that Act; and that the orders were bad in law and ultra vires in that they were made to secure an object which it was not within the powers of the Central Land Board to achieve—namely, to enforce their policy that land, and in particular the land comprised in the orders, should only be sold at a price based on existing use value, and/or to encourage or promote or assist its development.

C. N. Glidewell for the applicant.
Sir Frank Soskice, A.-G., and *Ashworth* for the respondents.

The arguments sufficiently appear from the judgment.

DEVLIN, J., stated the facts as set out above, read para. 15 of Sch. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, and continued:—The first ground on which it is submitted that the board had no power to make the order and the Minister no power to confirm it is because, at the time when the order was made by the board on July 17, 1950, planning permission had not been granted. It is therefore necessary to turn to s. 43 of the Town and Country Planning Act, 1947, to see exactly what the powers of the Central Land Board are under that section.

[His Lordship read s. 43, sub-ss. 1 and 2, and continued:] Section 43 has already been considered and construed by the Court of Appeal in *Earl Fitzwilliam's Wentworth Estates Co. Ld.* v. *Minister of Town and Country Planning and Another* (2). Various points upon the construction of the section have been taken in the argument before me, some of which the parties are precluded from taking in this court by reason of that decision; but they have taken them in order that their rights may be reserved if this case should go before a higher court in which the *Fitzwilliam* decision (2) can be questioned. The decision is, of course, binding on me and I propose, in dealing with the arguments that have been addressed to me, to consider only those which seem to me to arise for my consideration in the light of the principles which are laid down in the *Fitzwilliam* case (2).

The first point was only considered very indirectly in the *Fitzwilliam* case (2). There planning permission had at all relevant times been granted. Here the planning permission was not granted until after the order was made, and the case for the applicant is that the planning permission was granted too late, and that neither the board nor the Minister had under s. 43, sub-s. 1, any jurisdiction to make the order. The relevant words

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of the section are ". . . and in particular may so acquire any "land for the purpose of disposing of it for development for "which permission has been granted". The case for the applicant is that the board and the Minister are thereby impliedly prohibited from acquiring the land until the permission has been granted, so that the order in this case was premature and should be set aside.

The Minister, in answer to this contention, first of all says that the phrase "for which permission has been granted" does not relate to the time of acquisition at all, but relates to the purpose to which the section refers: "in particular may so "acquire any land for the purpose of disposing of it for develop-"ment for which permission has been granted". According to that construction the board may acquire the land irrespective of whether or not planning permission has been granted so long as at the time of the acquisition the purpose which they have in mind is a purpose of disposing of it for development, for which permission will by that time have been granted.

That construction of the sub-section is contrary, it is agreed, to the opinion which Denning, L.J., expressed on this point in several places in his judgment in the *Fitzwilliam* case (2). The point was not for decision in the *Fitzwilliam* case (2); it did not arise directly or indirectly. Denning, L.J., reviewing, as the other Lords Justices did, the machinery of the Act, naturally expressed his view on what he thought was the meaning of these provisions which, so far as the *Fitzwilliam* case (2) was concerned, were merely incidental. However, I think that there is a simple ground (although logically it comes later) on which the applicant's case in this matter fails, and I shall not, therefore, decide the point on the first ground which was submitted to me by the Minister, particularly having regard to the dicta of Denning, L.J., which, even though they may be obiter, are entitled to the highest respect. I should not have thought it wise to decide the case on that ground without giving much further consideration to the matter.

Assuming that the Minister fails on that point, and assuming that the planning permission must, therefore, have been granted at the time of acquisition, it appears to me that the applicant fails, because he has not shown that planning permission was not granted at the time of acquisition. The order that is made by the board is not and cannot be the acquisition of the land. It has no effect at all. It is really, although it is called an order, no more than a draft that is submitted for the Minister's consideration and for his confirmation. Until it is confirmed it is of no legal effect or value whatsoever. When it is confirmed it does not acquire the land, and the board does not by virtue of the confirmation acquire the land. The board are given authority to acquire the land, and in pursuance of that authority they have to serve a notice to treat and so forth, and then ultimately, in pursuance of the notice to treat, they may acquire the land. What s. 43 says, in my judgment, is simply that they may not at that time—that is, the time of acquisition—acquire the land unless permission has by that time been granted. The motion to quash the orders of the Central Land Board and of the Minister is, therefore, in my view on this point misconceived.

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That that is the right reading of the section is confirmed by this consideration. Section 43, sub-s. 1, is not necessarily concerned with compulsory acquisition. It is an enabling section conferring on the board the right to acquire land; without that section they could not acquire land at all. So far as sub-s. 1 is concerned it contemplates that the land will be acquired by agreement. It opens by saying: " The Central Land Board may, " with the approval of the Minister, by agreement acquire land ". It is only if no agreement is reached that sub-s. 2 comes into force with its provision for compulsory acquisition. But it is clear that the words " for which permission has been granted " must be given a meaning which is appropriate to the acquisition of land by agreement, and that does not depend on any compulsory purchase order. It is difficult to see what meaning it can be given in relation to the acquisition of land by agreement unless it refers to the act of acquisition itself. Accordingly Mr. Glidewell, for the applicant, has found it necessary to contend that whether the land be acquired by agreement or by compulsory purchase the section must be read as if the word " acquire " meant " first start the process of acquisition ". In relation to acquisition by agreement he contends that it would mean when the board first made the offer to acquire it. In relation to acquisition by compulsory purchase he contends that it must mean the order of July 17, 1950, although I confess that I did not follow why, on his argument, it did not mean the letter of April 1, 1950, offering to acquire by agreement which preceded that. In my judgment one cannot read that meaning into the word " acquire ". The section means, I think, that when the time comes for acquisition in the ordinary sense of the word the board may not acquire it until permission has been granted. I emphasize again that I am dealing with the construction of this section on the assumption that the provisions about granting permission refer to the time of acquisition and not to the purpose. That, therefore, disposes of the first point on which the validity of these orders is challenged.

The other ground set out in the notice of motion is this: "that the said orders are bad in law and ultra vires in that they "and each of them were made to secure an object which it was "not within the defendant Central Land Board's powers to "achieve—namely, to enforce their policy that land, and in particular the land comprised in the said orders, should only be "sold at a price based on existing use value, and/or to encourage "or assist or promote its development".

That argument comes into the sphere which was considered by the Court of Appeal in *Earl Fitzwilliam's Wentworth Estates Co. Ld.* v. *Minister of Town and Country Planning and Another* (2), and accordingly Mr. Glidewell has in this court been circumscribed in his presentation of it. It is necessary for him to distinguish the decision in the *Fitzwilliam* case (2), and the two factors which he relies upon as distinguishing factors are these: first, that in this case, though not in the *Fitzwilliam* case (2), the land was withdrawn from the market by the letter of April 18, 1950; and, secondly, that this was a case where the motive or object of the order was the encouraging, assisting or promoting of the development of the land. The two points are, I think, a little connected, but they do at any rate make between them a ground of distinction which it is necessary to consider.

It is conceded by Mr. Glidewell that the effect of the decision in the *Fitzwilliam* case (2) is that the board may properly exercise their powers in order to prevent sales of land at more than its existing use value. His contention is that that object is a negative one, and that they have no right to use their powers for the positive purpose of promoting the development of land; and that they were using it for that positive purpose here is shown by the fact that they were acquiring land which had been withdrawn from the market and which, therefore, might not be sold at all.

Once one concedes that the board may exercise their powers to prevent sales at more than the existing use value it must, I think, follow that the board may intervene before the sale is

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completed; a sale cannot be prevented after it had been completed. They must intervene at some stage, presumably when there has been an offer for sale or when they have some other reason to think that a sale at more than existing use value may go through unless it is prevented. Indeed, in the *Fitzwilliam* case (2) what had happened was that there was an offer for sale at a price which the offeree was not willing to accept. There was no evidence, as I understand it, that there was any offering for sale outside that particular transaction. That being so, it follows that the board may use their powers when there has been an offer for sale in order to intervene and prevent the sale at more than the existing use value. In this case there had been an offer for sale, but the offer had been withdrawn. That fact of the withdrawal does not seem to me to touch the board's jurisdiction. It may be a good reason for the board—it is a matter entirely for them—to decide that the offer having been withdrawn there is no longer any serious danger of a sale at more than the existing use value. But that is a factor which goes to the discretion which the board will undoubtedly have to exercise once it is clear that the power has been granted to them; it is not a factor which, in my judgment, determines the nature of the power. Of course, it is obvious that people who desire to sell at more than the existing use value, may, when they get a letter from the district valuer and from the board which shows that the board are threatening to exercise their powers, think it wise to retreat temporarily from the market. I am not saying that that was done in this case; it is not for me to judge of that, but it is a possible view. It would, in my judgment, be unreasonable to say, if the board had power to intervene in the first instance, that merely because the offer is withdrawn their power is automatically taken away from them. It seems to me that this is a matter of which the board must be the judge. If, in all the circumstances of the case, they think it necessary to intervene in order to prevent sales at more than the existing use value, then on the authority of the *Fitzwilliam* case (2) they have power under s. 43 of the Act so to do.

I need perhaps hardly add this, that I do not think that that means that there is the slightest danger of the board going round the countryside acquiring land that has never been offered for sale merely because they say that they want to prevent sales at more than the existing use value. If that sort of situation arose, then

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TRAVIS v. MINISTER OF LOCAL GOVERNMENT AND PLANNING.

Devlin, J.

it might very well be that in a proper case it could be argued that the board could not in good faith suppose that any sale at more than the existing use value was contemplated. That might be the case, for example, if they approached a farmer who had farmed his land for many years and who had never shown the slightest intention of parting with it, and wanted to acquire his land on the ground of preventing a sale at more than the existing use value. But here there is material on which they might conclude that this land might be offered again after a suitable interval for sale at more than the existing use value, and that, in my judgment, brings the matter within their powers.

I do not, therefore, need to consider whether, if the only object or one of the objects of the board had been merely to encourage, assist or promote the development of land, the order would be bad. There are dicta in the *Fitzwilliam* case (2) which state that that would not be a proper object, but I do not find it necessary to go into that, because I see no reason to doubt the statement that is made in the affidavit of the deputy chairman of the board: "In considering the performance of their functions "under the aforesaid Act the board are and have at all material "times been of opinion that the determination and collection of "development charge would be rendered more difficult if intending developers were unable to buy land except at prices substantially higher than the existing use value"; and that, in making the order, they were giving effect to that opinion and were taking into consideration the fact that the owner had been willing to sell the land and then later had withdrawn it from sale. The motion must be dismissed.

Motion dismissed.

Solicitors: *Pritchard, Englefield & Co., for Lloyd & Davies, Manchester; Treasury Solicitor.*

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BLANE STEAMSHIPS LD. *v.* MINISTER OF TRANSPORT.

[1950 B. No. 4974.]

C. A.

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July 4, 5, 6, 9, 10, 11, 12; 30.

Cohen, Singleton and Morris, L.JJ.

Shipping—Time charterparty—Option to purchase ship, in charterparty—Ship stranded—Notice of abandonment to underwriters—Purported exercise of option to purchase—Implied termination of contract if commercial purpose of charterparty rendered impossible—Frustration.

The plaintiffs chartered the ship *Empire Gladstone* from the owner, the Minister of Transport, for five years from the date of delivery, by a demise charterparty, by which all risk and expense of the ship and the stores should be borne by the charterers throughout the charterparty. The charterers were for that period to insure the ship and keep her insured against all the usual marine risks for and on a valuation of 130,000*l.* sterling and were to assign to the owner the current policies of insurance and all moneys insured by or to become payable under the policies.

By cl. 7: "In the event of the ship becoming a wreck or "obstruction to navigation the charterers shall indemnify the "owner against any sums which the owner shall become liable to "pay and shall pay in respect of the removal or destruction of the "wreck or obstruction under statutory powers".

By cl. 8: "If the ship be lost, hire shall be paid up to and "inclusive of the day of loss, or, if missing, up to and inclusive of "the day last reported. Should the ship become a constructive "total loss, such loss shall be deemed to have occurred on, and hire "under the charterparty shall cease as from the day of the casualty "resulting in such loss", and by cl. 11: "The charterers shall "have the option to be exercised by notice in writing given to the "owner not later than three months before the expiration of the "charterparty to purchase the ship as she then lies for the sum "of 130,000*l.* (basic price for purchase) less depreciation at the rate "of 5 per cent. per annum for the period between the date of "delivery hereunder and the date of transfer of the ship to the "charterers".

The ship was delivered to the charterers on August 17, 1946, and insured by them in accordance with the terms of the charter. In July, 1950, the plaintiffs were minded to exercise their option, but had not done so by September 1, 1950, when the ship sailed from Sydney for Adelaide. In the evening of September 5, 1950, the ship stranded at a point about 195 miles south of Sydney Heads. On September 6, 1950, the charterers gave notice of abandonment to the underwriters, who declined to accept the notice, but agreed to place the assured in the same position as if a writ had been issued.

At 10 a.m. on September 7, 1950, the charterers purported to exercise the option to purchase the ship contained in the charter. The owner refused to recognize the validity of the exercise of the option, stating that the vessel was or was about to become a constructive total loss, in which case the loss of the ship would, under cl. 8 of the charterparty, be deemed to have occurred on the date of the casualty—September 5—and that the charterparty ceased to apply from that day. On September 8 the owner confirmed to the brokers that he had abandoned the ship. On September 12 the master and the crew (other than the firemen who had already left) abandoned the ship. On September 20 the underwriters accepted the ship as a constructive total loss and it was conceded that she was a constructive total loss as from September 12.

The plaintiffs claimed a declaration that the option to purchase the ship had been validly exercised and to be entitled to the benefit of the policies of insurance. The defendant denied both claims and counterclaimed that he was entitled to the benefit of the policies. The trial judge expressed the view that the ship had to all intents and purposes been destroyed before 10 a.m. on September 7, 1950; that the charterparty had been frustrated before that date and that the plaintiffs had then no longer any rights, under cl. 11 thereof, to elect to purchase the vessel.

On appeal, it was contended for the Minister, the owner of the ship, (1.) that the ship was an actual total loss before 10 a.m., British summer time, on September 7, 1950. If he was right on this point, it was common ground that the owner was entitled to succeed; (2.) that the ship was a constructive total loss before that time; and that, if so, the owner was entitled to succeed (both these propositions were contested); and (3.) that the fulfilment of the commercial purpose of the charterparty had been rendered impossible before that time, and so the contract had been frustrated.

Held, that at the time of the purported exercise of the option to purchase the ship by the charterers, which was contained in cl. 11 of the charterparty, viz., 10 a.m. on September 7, 1950, the charterparty had terminated and the right to exercise the option no longer existed.

Cohen, L.J., who expressed no opinion whether or not there was an actual, or constructive, total loss of the ship before 10 a.m. on September 7, and Singleton, L.J., who expressed the view that it was not shown the ship was an actual total loss or that she was a constructive total loss (if the question depended on the definition of "constructive total loss" contained in s. 60 of the Marine Insurance Act, 1906), before that time, came to their conclusion on the ground that a term must be implied in the charterparty that in the event of the further use of the ship for the purposes of the charter becoming commercially impossible, the contract should automatically be brought to an end, and that there was nothing in the terms of the charterparty inconsistent with the implication of that term, which was the natural corollary of cl. 8 of the charterparty. On the facts, both Lords Justices supported the finding of the trial judge that to all intents and purposes the subject-matter of the charterparty—the ship—had been destroyed before 10 a.m. on September 7, 1950, and that, before that date, the charterparty was commercially frustrated.

Bank Line Ld. v. *Arthur Capel & Co.* [1919] A. C. 435, where the application of the principle of frustration to a modern time charter was considered, followed.

Cohen, L.J., and Singleton, L.J., in construing cl. 8 of the charterparty, said that the trial judge regarded it only as putting an end to the liability of the charterers to pay hire money as from the date of the casualty, whether the total loss was actual or constructive. They (the Lords Justices) inclined to the view that the intention was to place constructive total loss on the same basis as actual total loss. It was admitted that in the event of actual total loss before 10 a.m. on September 7, the charterparty would have been brought to an end, and the intention of cl. 8 was to produce the same result in the event of constructive total loss. But the point was by no means clear.

Morris, L.J., who found on the evidence that the ship was not an actual total loss at the material time, said that it was unnecessary to decide whether it was a constructive total loss at that time apart from the effect of "relation back" under cl. 8 of the charterparty. He came to the same conclusion that the charterparty had terminated before 10 a.m. on September 7, on the ground that it was necessary to imply a term in the charterparty that as from the time when hire payments ceased to be due under cl. 8, the charterparty terminated. On that basis the expiration date of the charterparty was on September 5, 1950. On any view, and by express admission, there was a constructive total loss by September 12, and by cl. 8 such constructive total loss must be regarded as having occurred on September 5, and hire under the charterparty ceased from that date. If the words of cl. 8 did not express the common intention that the charterparty should expire on that date, viz., that which was to be deduced from a consideration of the charterparty as a whole, then words must necessarily be implied which would clothe and formulate it.

Per MORRIS, L.J.: As to the issue of frustration, on the hypothesis that there was an implication in the charterparty that the fulfilment of the commercial purpose of the hiring must continue to be possible, whether or not the ship was technically an actual or constructive total loss, then he shared with his brethren the conclusion on the facts that on or before 10 a.m. on September 7 the vessel was no longer capable of any further use as a cargo-carrying ship.

Per COHEN, L.J.: In the thirteenth edition of Arnould on Marine Insurance, in para. 1213, at p. 1114, the view was expressed that if notice of abandonment of a vessel is given to underwriters, but not accepted, the vessel became res nullius.

The decision of Bailhache, J., in *Boston Corporation* v. *France, Fenwick & Co.* (1923) 28 Com. Cas. 367, supported that statement, but in *Oceanic Steam Navigation Co. Ld.* v. *Evans* (1934) 40 Com. Cas. 108, 111, Greer, L.J., made an observation to the contrary. That view was obiter, but the decision of Bailhache, J., seemed to be difficult to reconcile with the option given to the assured by s. 61 of the Marine Insurance Act, 1906, to treat the loss as a partial loss and with the doctrine of ademption of loss explained in Chalmers' Marine Insurance Act, 1906 (4th ed.), at p. 89.

APPEAL from Croom-Johnson, J.

The defendant chartered to the plaintiffs the ship *Empire Gladstone* on August 3, 1946, for five years from the date of delivery, at a monthly rate of 1,075*l*.—any hire paid in advance and not earned to be refunded to the plaintiffs.

By cl. 1, sub-cl. 5, of the charterparty: "Should the ship "become an actual or constructive total loss before delivery "hereunder, this charterparty shall become null and void".

By cl. 7: "All risk and expense of the ship and her stores "shall be borne by the charterers throughout this charterparty. "Further, the charterers shall throughout this charterparty insure "the ship and keep her insured at the charterers' own expense "against all the usual marine and war risks for and on a valuation of 130,000*l*. sterling (or of such other sum as may from "time to time be mutually agreed) and shall assign to the owner "the current policies of insurance and all moneys insured by or "to become payable under the said policies and the full benefit "thereof. In the event of the ship becoming a wreck or obstruction to navigation the charterers shall indemnify the owner "against any sums which the owner shall become liable to pay "and shall pay in respect of the removal or destruction of the "wreck or obstruction under statutory powers".

By cl. 8: "If the ship be lost, hire shall be paid up to and "inclusive of the day of loss, or, if missing, up to and inclusive "of the day last reported. Should the ship become a constructive total loss, such loss shall be deemed to have occurred on, "and hire under this charterparty shall cease as from the day of "the casualty resulting in such loss. In ascertaining whether "the ship is a constructive total loss for the purpose of this "clause, the insured value under cl. 7 shall be taken as the "repaired value, and nothing in respect of the damaged or "breaking up value of the ship shall be taken into account".

By cl. 10: "Nothing in this charterparty shall operate to "impair the Crown's right to requisition the ship at any time, "and in the event of the exercise of such right, this charterparty "shall thereupon expire".

By cl. 11: "The charterers shall have the option to be exercised by notice in writing given to the owner not later than "three months before the expiration of this charterparty to purchase the ship as she then lies for the sum of 130,000*l*. (basic

" price for purchase) less depreciation at the rate of 5 per cent. " per annum for the period between the date of delivery here- " under and the date of transfer of the ship to the charterers ".

The ship was duly delivered to the plaintiffs on August 17, 1946, and insured by them in accordance with the terms of the charter. There were three policies, the first for 79,040*l*. with Lloyds Underwriters, the second for 47,630*l*. with the Institute of London Underwriters, and the third for 3,330*l*. with the Excess Insurance Company Ld. In July, 1950, the plaintiffs were minded to exercise their option, but they had not done so by September 1, 1950, on which date the ship sailed for Adelaide from Sydney with a cargo of iron ore on board, and there was also stored between decks and on deck some motor bodies and spare parts.

At 7.55 p.m., local time, on September 5, 1950, the ship went aground at Iola Point about 196 miles south of Sydney Heads. Thereafter the master sent a series of telegrams to agents at Sydney and Melbourne and to the plaintiffs in London. The first telegram to the Sydney agents was: " Prospects of refloating " hopeful if weather continues fine. Engines disabled. Please " send tug endeavour refloat ". However, telegrams of the same date to London contained the words: " Vessel hard aground and " pounding heavily. Weather fine but swell heavy ". On the same day Melbourne telegraphed the plaintiffs reporting the accident, but saying: " No immediate danger ". On September 6 the master became less hopeful, his telegram to London reporting all double-bottom tanks full except three on starboard side, and making water shaft tunnel. The telegram contained the following phrases: " Position now serious . . . tug not here " but very doubtful if can tow ship off, also doubtful if remain " afloat if towed off ". This telegram was received in London at 3.40 p.m. on September 6 apparently shortly after another telegram from the master, which read as follows: " *Gladstone*. Our " representative accompanied by salvage officer in attendance " vessel which hard aground on rock forward hold tidal making " water aft bottom apparently extensively damaged engines dis- " abled shaft disaligned various other damage. Preliminary " examination definitely indicates vessel not immediately salvable. " Detailed examination being carried out to determine if major " salvage operation feasible which consider doubtful. Appears " practicable salvage motor bodies investigating. Weather calm " hopeful continuing crew remaining aboard present probably "disembarking firemen tomorrow others remaining await further "developments".

On September 6, the plaintiffs instructed their brokers as follows: "*SS. Empire Gladstone*, September 5, 1950: Ashore "Haystack Rock about 200 miles south of Sydney, N.S.W. "Please convey notice of abandonment to underwriters as "follows:—Referring to the above casualty, we beg to abandon "our insured interest in the *Empire Gladstone* unconditionally to "underwriters and collect payment for total loss. In the event "of non-acceptance of this notice of abandonment, kindly put us "in the same position as if a writ had been issued this day". The brokers carried out their instructions, giving notice to Lloyds and the Institute of London Underwriters on September 6, 1950, and to the Excess Insurance Company Ld. at a slightly later date. The underwriters all immediately declined to accept abandonment but agreed to place the assured in the same position as if a writ had been issued.

At 10 a.m., British summer time, on September 7, 1950, the plaintiffs delivered by hand to the defendant a letter dated September 6, purporting to exercise the option of purchase contained in the charter. They also wrote to the London Steamship Insurance Company as follows: "We confirm our telephone con"versation of yesterday afternoon . . . when you were advised "that the vessel had gone ashore in the above position. From "messages received it appears that the vessel may become a total "loss". At this time only the firemen had been landed, the master and the rest of the crew remaining on the ship. The ship had not yet been fully examined by a salvage officer. He in fact proceeded from Sydney on September 6 by air to make a preliminary examination. From this time on the salvage association received a series of telegrams from their agents in Sydney. These indicated that the prospects of successful salvage were most doubtful; indeed, on September 10 it was stated: "Prospects ultimate salvage negligible". It was not, however, until September 12 that the master and the remainder of the crew left the ship.

In the meantime, on September 8 the defendant had written to the plaintiffs refusing to recognize the validity of the purported exercise of the option, and saying: "I am directed by the "Minister of Transport to refer to your letters of September 6 "and 7. The Minister has noted that you wish to purchase the "*Empire Gladstone*. However, it appears from reports that this "vessel is, or is about to become, a constructive total loss, in "which case the loss of the ship will, in accordance with the "provisions of cl. 8 of the charterparty, be deemed to have "occurred on the day of the casualty resulting in the loss. It "would therefore appear that the charterparty, including cl. 11 "(option to purchase) ceased to apply from the day of the "casualty so that the notice of your desire to purchase the ship, "given in your letter of September 6, was without effect It is "understood that you have abandoned the ship to underwriters, "presumably on behalf of the Minister, and the Minister has "confirmed to the underwriters that he has abandoned the "ship". On September 8 the Minister confirmed to the brokers that he had abandoned the ship. The insurers, who had originally refused to accept notice of abandonment of the ship, ultimately accepted her as a constructive total loss on or about September 20, 1950.

The defendant refusing to recognize this claim, the plaintiffs issued their writ on September 20, 1950, claiming a declaration that the option had been validly exercised, and to be entitled to the benefit of the policies of insurance. The defendant denied the plaintiffs' right, and, by counterclaim, claimed to be entitled to the benefit of the policies. The action was tried by Croom-Johnson, J., who expressed the view that, after notice of abandonment had been given on September 6, the ship *Empire Gladstone* had to all intents and purposes been destroyed. He held that before 10 a.m. on September 7, 1950, the charterparty had been frustrated and the plaintiffs had then no longer a right under cl. 11 thereof to elect to purchase the ship. Accordingly, he gave judgment for the defendant on the claim and the counterclaim. The charterers, the plaintiffs, appealed.

If the election to purchase the vessel was valid the charterers could have purchased the ship for about 103,000*l*. The policy moneys would amount to 130,000*l*.

Ashton Roskill, K.C., and *Eustace Roskill* for the charterers. This was the old form of a time charterparty—a demise charterparty. As MacKinnon, L.J., said in *Sea and Land Securities Ld.* v. *William Dickinson & Co.* (1): "Between the "old" (a demise charterparty) "and the modern form of con-"tract there is all the difference between the contract which a

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(1) [1942] 2 K. B. 65, 69.

"man makes when he hires a boat in which to row himself "about and the contract he makes with a boatman that he shall "take him for a row". The risk and expense of the vessel were on the charterers. Emphasis was laid in the tender on the option to purchase, subsequently contained, in cl. 11 of the charterparty, and it is conceded here that before the ship left Sydney the charterers were considering the exercise of that option. The issue here is whether or not there was a valid exercise of that option at 10 a.m., British summer time, on September 7, 1950.

One question which arises is whether the ship was a constructive total loss before that time. That is denied. Further, the charterers claim that even if she were a constructive total loss they were entitled to exercise the option. Notice of abandonment was given on September 6, 1950, to the underwriters, but was not accepted, and, therefore, on general principles at an end, and the position was as though the notice had never been given. The expression "constructive total loss" cannot be used colloquially as a layman's phrase. It is specifically defined in s. 60 of the Marine Insurance Act, 1906 (2), and it is not permissible to go outside the definition there set out.

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(2) Marine Insurance Act, 1906, s. 57, sub-s. 1: "Where the subject-"matter insured is destroyed, or so "damaged as to cease to be a thing "of the kind insured, or where the "assured is irretrievably deprived "thereof, there is an actual total "loss".

Sub-s. 2: "In the case of an actual "total loss no notice of abandonment "need be given".

Section 60, sub-s. 1: "Subject to "any express provision in the policy, "there is a constructive total loss "where the subject-matter insured is "reasonably abandoned on account of "its actual total loss appearing to be "unavoidable, or because it could not "be preserved from actual total loss "without an expenditure which would "exceed its value when the expenditure had been incurred".

Sub-s. 2: "In particular, there is "a constructive total loss—(i) where "the assured is deprived of the possession of his ship or goods by a "peril insured against, and (*a*) it "is unlikely that he can recover the "ship or goods, as the case may be, "or (*b*) the cost of recovering the "ship or goods, as the case may be, "would exceed their value when re-"covered; or (ii) In the case of "damage to a ship, where she is so "damaged by a peril insured against "that the cost of repairing the "damage would exceed the value of "the ship when repaired.

"In estimating the cost of repairs, "no deduction is to be made in "respect of general average contribu-"tions to those repairs payable by "other interests, but account is to be "taken of the expense of future sal-"vage operations and of any future "general average contributions to "which the ship would be liable if "repaired; or . . .".

Section 61: "Where there is a "constructive total loss the assured "may either treat the loss as a par-"tial loss, or abandon the subject-"matter insured to the insurer and "treat the loss as if it were an actual "total loss".

Section 62, sub-s. 1: "Subject to "the provisions of this section, where "the assured elects to abandon the

First, on the facts at the relevant time, there was no constructive total loss. No final conclusion had been arrived at as to salvage. The divers who were to investigate the damage did not operate until September 10, and the master and crew remained on board until September 12. The motor bodies and parts were discharged by the ship's gear between September 7 and 9. It was not until September 9 that one of the two surveyors who were engaged to investigate and report on the prospects of salvage left Melbourne for the vessel.

The vessel was not abandoned until the master and crew left the ship on September 12. For the ship to become a constructive total loss she must in fact be "reasonably abandoned" for one of two reasons, as appears from the terms of sub-s. 1 of s. 60. The vessel must be abandoned, and this is simply a question of fact: see *Court Line Ld.* v. *The King* (3). Clause 25 in the charterparty in that case was similar to cl. 8 in the one under consideration: see the judgments of Scott, L.J. (4), and of du Parcq, L.J. (5). It appears from the reasoning underlying that decision that abandonment under s. 60, sub-s. 1, means abandonment of the ship. But here there was no abandonment of the ship until September 12. It becomes immaterial, therefore, to inquire whether she was abandoned on account of her actual total loss appearing to be unavoidable, or because she could not be preserved from actual total loss without an expenditure which would exceed her value when the expenditure had been incurred. If the case does not come within the terms of sub-s. 1 of s. 60 it does not come within the terms of sub-s. 2. At the material time, therefore, the ship was not a constructive total loss because she had not then been abandoned by the master and crew. Neither was she an actual total loss: see the terms of s. 57. We challenge the statement of the trial judge that the position was hopeless on September 6, but we concede that it was then serious. The foundation of the judgment was that at the material time the ship had, to all intents and purposes, been destroyed. It had

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"subject-matter insured to the insurer, "he must give notice of abandonment. "If he fails to do so the loss can only "be treated as a partial loss".

Sub-s. 4: "Where notice of abandonment is properly given, the "rights of the assured are not prejudiced by the fact that the insurer "refuses to accept the abandonment".

Sub-s. 6: "Where notice of abandonment is accepted, the abandonment is irrevocable. The acceptance "of the notice conclusively admits "liability for the loss and the sufficiency of the notice".

(3) (1945) 78 Ll. L. Rep. 390.

(4) Ibid. 394–6.

(5) Ibid. 399.

not been so destroyed. It remained a ship, in a serious position, the damage to which had still to be ascertained. The ship was not then a mere congeries of planks. There was no evidence that the ship was an actual total loss.

[Singleton, L.J., referred to cl. 8 of the charterparty, by which "If the ship be lost, hire shall be paid up to and inclusive of the day of loss, or if missing, up to and inclusive of the day last reported. Should the ship become a constructive total loss, such loss shall be deemed to have occurred on, and hire under this charterparty shall cease as from the day of the casualty resulting in such loss. In ascertaining whether the ship is a constructive total loss for the purpose of this clause the insured value under cl. 7 shall be taken as the repaired value, and nothing in respect of the damaged or breaking up value of the ship shall be taken into account".]

That clause relates only to payments by way of hire, and it is to enable the charterers in the event of constructive total loss to recover payments of hire made in advance between the time of the constructive total loss and the casualty. Without these words there would be no such right.

[Cohen, L.J. If that is the case, the words in the clause "such loss shall be deemed to have occurred on, and" would appear to be surplusage.]

These words do not, perhaps, add much to the meaning. If these words are treated as otiose my case is not harmed. The presence of these words does not justify any limitation on the option to purchase the ship, provided by cl. 11 of the charterparty. It is impossible, as a matter of construction, to read cl. 8 as providing that the option is to cease, either in the event of a constructive total loss, or if there is a constructive total loss as a result of a casualty, to date back to the casualty.

[Cohen, L.J. If the ship had become an actual total loss could you have exercised your option under cl. 11?]

No, since the option is to purchase a ship. If there were a constructive total loss, ex hypothesi, she continues to be a ship, but that is not the case where the ship has become an actual total loss.

The trial judge by his finding, that for all intents and purposes the vessel was destroyed on September 6, was reasoning from what became known afterwards in the days after September 7 and not on the facts as known at the time by a reasonable assured. If the ship was a constructive total loss at the relevant time (so long as the charterparty was not frustrated) that did not prevent the charterers from exercising their option to purchase the ship. Then the charterers could exercise their right under s. 61 to treat the loss as a partial loss: see the doctrine of ademption of loss explained in Chalmers' Marine Insurance Act, 1906 (4th ed.), at p. 89. A bill of sale would be necessary to transfer the property in the ship unless there were a constructive total loss. If there were a constructive total loss the mere exercise of the option transferred the property in the ship.

Section 60, sub-s. 2 (i), does not apply to a case of stranding: see the judgments in *Court Line* v. *The King* (3).

[COHEN, L.J. It was not held in that case that notice of abandonment (which was not given in that case) was immaterial.]

Our contention is that abandonment within sub-s. 1 of s. 60 means the physical leaving the ship with no hope of returning to it in hope of recovering the ship. If notice of abandonment is a factor to be taken into account, it is not a very important factor. The view of Bailhache, J., taken in *Boston Corporation* v. *France, Fenwick & Co. Ld.* (6), that if notice of abandonment is given, but not accepted, by the underwriters, the ship becomes res nullius, was not approved by Greer, L.J., in *Oceanic Steam Navigation Co. Ld.* v. *Evans* (7). To continue as regards s. 60, sub-s. 2 (i): The assured was not deprived of the possession of his ship within the meaning of the sub-section. Again, it was not at the material time "unlikely" that he could recover the ship, but merely uncertain whether he could do so. Section 60, sub-s. 2 (ii), could only arise, if repair were feasible, but not economically worth while, but there need not be physical abandonment.

Passing to the argument on frustration on which the trial judge relied in deciding this case, there is, in fact, no authority either way as to whether a demise charterparty can be frustrated. It is submitted that such a charterparty, being in the nature of a lease, is not capable of being frustrated: see *Cricklewood Property and Investment Trust Ld.* v. *Leighton's Investment Trust Ld.* (8). In this particular demise charterparty the risk is severed from the property: see the first sentence of cl. 7 of the charterparty. The property in the ship remained with the owner, the Minister; the risk remained with the charterers. It is unlikely that the charterers can be relieved of the risk by frustration. There cannot be frustration by any damage to a vessel which falls short of a constructive total loss: see *Court Line* v. *The King* (9).

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(3) 78 Ll. L. Rep. 390.

(6) (1923) 28 Com. Cas. 367.

(7) (1934) 40 Com. Cas. 108, 111.

(8) [1945] A. C. 221.

The trial judge relied on *Denny, Mott & Dickson Ld.* v. *James B. Fraser & Co. Ld.* (10). That case was very far removed from this. In that case the option to purchase never arose: see the speech of Viscount Simon, L.C. (11). There was nothing in that case to support the view that the charterparty in this case was frustrated. Viscount Simon, L.C., in *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.* (12), said that the most satisfactory basis on which the doctrine of frustration could be put was that it depended on an implied term in the contract of the parties (13). If the court cannot imply a term here that in the event of the further use of the charterparty becoming commercially impossible the contract should be brought to an end, then there is no frustration.

[COHEN, L.J. Could the charterers abandon the ship within the meaning of s. 60?]

Yes, since it was a demise charter. The charterers thought that they had to give notice of abandonment as a condition precedent to recovery. If the Minister claimed the moneys due under the policies the reply would be: "You have suffered no "loss because the ship is at the charterers' risk under cl. 7". The ship was not validly abandoned unless and until the notice was accepted: see *Brotherston* v. *Barber* (14), a case which also illustrates the doctrine of ademption.

[COHEN, L.J. Did not the Minister ratify the notice of abandonment?]

He could not do so unless the notice had been validly given by a person professing at the time to be acting for a principal: *Keighley, Maxstead & Co.* v. *Durant* (15). *Brotherston* v. *Barber* (14) was followed by *Pesquerias, etc.* v. *Beer* (16) (point not affected by the decision in the Court of Appeal): see also *Irvin* v. *Hine* (17). The mere giving of notice of abandonment does not deprive the assured of his election under s. 61. It is only where notice of abandonment has been accepted that it becomes irrevocable: see s. 62, sub-s. 6. As we have stated, the view of Greer, L.J., in *Oceanic Steam Navigation Co. Ld.* v. *Evans* (18) was that if notice of abandonment is given, but not accepted, the ship does not become res nullius. The vessel was not abandoned, but only the charterers' interests in the vessel. The theory that the ship in such case was res nullius, propounded by Bailhache, J., in *Boston Corporation* v. *France, Fenwick & Co. Ld.* (19), was inconsistent with the doctrine of ademption and the right of election given to the assured under s. 61. In the case on which Bailhache, J., relied, that of *Barraclough* v. *Brown* (20), the notice of abandonment was accepted. On the meaning of ademption, see *Roura & Forgas* v. *Townend and Others* (21), approved in *Robertson* v. *Petros M. Nomikos Ld.* (22). See the speech of Lord Porter in that case on s. 61 (23).

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(9) 78 Ll. L. Rep. 390.
(10) [1944] A. C. 265.
(11) Ibid. 270.
(12) [1942] A. C. 154.
(13) Ibid. 163.
(14) (1816) 5 M. & S. 418.
(15) [1901] A. C. 240.
(16) (1946) 79 Ll. L. Rep. 417, 433.
(17) [1950] 1 K. B. 555.
(18) 40 Com. Cas. 108, 111.

The only person who has an absolute right to abandon the ship is the owner: *Jardine* v. *Leathly* (24).

The owner could not give notice of abandonment because he had no interest in the insurance policies. Neither the owner nor the charterers could give notice of abandonment. There was no evidence that the charterers intended to cover any interests but their own. The notice of abandonment given by the charterers was incapable of ratification by the Minister because by that time the notice of abandonment had been rejected by the underwriters.

On the true construction of this charterparty the charterers were entitled to exercise this option and there was no implication of any term in the charterparty that the right of option goes should the vessel become a constructive total loss.

D. A. Scott Cairns, K.C., *Mocatta, K.C.*, and *R. P. Colinvaux* for the shipowner. It is plain that the true facts were that the *Empire Gladstone* on September 5, 1950, was a doomed vessel—a wreck. What is material are the true facts, not the facts which were known at the time. What the charterers thought of the position is shown by the fact that they gave notice of abandonment to the underwriters on September 6.

On these facts, our contentions are: (1.) that the vessel was an actual total loss before 10 a.m., British summer time, on September 7. If that is so, it is conceded that the charterers cannot succeed. (2.) Alternatively, that she was a constructive total loss at that time. If I fail to establish either of these two propositions, she was, before that time, as the trial judge found, in a position which was hopeless, that is, she was incapable of

(19) 28 Com. Cas. 367.
(20) [1897] A. C. 615.
(21) [1919] 1 K. B. 189.
(22) [1939] A. C. 371.
(23) Ibid. 392–3.
(24) (1863) 3 B. & S. 700; 32 L. J. (Q. B.) 132.

further service as a ship. If that is so, the subject of the charterparty—the ship—had to all intents and purposes been destroyed and the contract was frustrated. On any one of these grounds the charterparty was not in existence at 10 a.m., September 7, and so the charterers could not elect to purchase the ship under cl. 11 of that charterparty.

As to the first contention, the ship was, in the words of s. 57, sub-s. 1, of the Marine Insurance Act, 1906, "destroyed, or so "damaged as to cease to be a thing of the kind insured, or where "the assured is irretrievably deprived thereof". If a ship ceases to be capable of continuing to be a cargo-carrying ship, it is no longer a ship but a wreck, a congeries of planks. As Willes, J., said in *Barker* v. *Janson* (25): "If a ship is so injured that it "cannot sail without repairs, and cannot be taken to a port at "which the necessary repairs can be executed, there is an actual "total loss, for that has ceased to be a ship which never can be "used for the purposes of a ship". This ship became an actual total loss at the time of the stranding on September 5. The ship was ultimately sold as a wreck for 1,275*l.* I concede that the trial judge never directed his mind to the question whether this ship was then an actual total loss, though he did say that by September 6 the position was quite hopeless.

By s. 742 of the Merchant Shipping Act, 1894, "a 'ship' "includes every description of vessel used in navigation not "propelled by oars". This vessel could no longer be used in navigation. There was nothing to indicate that there was any substantial alteration in the condition of the vessel between September 5 and September 20. This vessel, or whatever it was, was reduced in value from 130,000*l.*, less some depreciation, before the stranding to 1,275*l.* after it. It is necessarily implied by the terms of a charterparty that the ship shall continue to exist as a ship, capable of navigation. If it does not so continue to exist, neither does the charterparty. [*Hall* v. *Hayman* (26) was mentioned.]

Secondly, this ship became a constructive total loss, at all events when the charterers gave notice of abandonment, to the underwriters on September 6. It is conceded here that the ship became a constructive total loss on September 12. It follows from the terms of cl. 8 of the charterparty that she is deemed to have become a constructive total loss from September 5, the date of the casualty, when hire ceased. Section 60, sub-s. 1, of the

(25) (1867) L. R. 3 C. P. 303, 305. (26) [1912] 2 K. B. 5.

Marine Insurance Act, 1906, only applies " where the subject-" matter insured is reasonably abandoned on account of its actual " total loss appearing to be unavoidable or because it could not " be preserved from actual total loss without an expenditure " which would exceed its value when the expenditure had been " incurred ". For the sub-section to apply, there must be abandonment. Our contention is that notice of abandonment is sufficient. The charterers contend that there must be abandonment by master and crew, animo relinquendi, sine animo revertendi et sine spe recuperandi: see *Court Line Ld.* v. *The King* (27). It has never been held that you can have notice of abandonment only for the purposes of sub-s. 1 of s. 60 (the first part), but Scott, L.J., said in the *Court Line* case (27) that this was sufficient for the second limb of sub-s. 1. du Parcq, L.J., did not agree with Scott, L.J., that notice of abandonment is used in different senses for each limb of sub-s. 1. But there was no notice of abandonment to underwriters in the *Court Line* case (27). There is no decision that notice of abandonment is not sufficient to bring the case within sub-s. 1 of s. 60. Sub-section 4 of s. 60 shows that where notice of abandonment to underwriters is not accepted, the rights of the assured are not thereby prejudiced. My submission is that the opinion of du Parcq, L.J., was correct, and notice of abandonment to underwriters may be " abandonment " in the sense stated by the Lord Justice with regard to both the alternative limbs in sub-s. 1. The giving of a valid notice of abandonment divests the assured of his property in the ship. If the ship is afterwards restored to the assured, the property reverts to him. There is nothing in the reports inconsistent with that view of the law. But I concede that if the notice of abandonment is not accepted by the underwriters a valid notice of abandonment does not pass the property. Then the case does not come within sub-s. 1 of s. 60 on the definition of du Parcq, L.J. The ship is then res nullius: see the decision of Bailhache, J., in *Boston Corporation* v. *France, Fenwick & Co. Ld.* (28). I agree that Greer, L.J., in *Oceanic Steam Navigation Co. Ld.* v. *Evans* (29), expressed an opinion to the contrary. Further, in the other case cited on this point at para. 1213 of the thirteenth edition of Arnould on Marine Insurance—*Allgemeine Versicherungs Gesellschaft Helvetia* v. *Administrator of German Property* (30)—there is no suggestion that the ship in

(27) 78 Ll. L. Rep. 390.
(28) 28 Com. Cas. 367, 373.
(29) 40 Com. Cas. 108, 111.
(30) [1931] 1 K. B. 672, 687.

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these circumstances is res nullius. Valid abandonment means that, the facts constituting a constructive total loss, the assured is entitled to give notice of abandonment to the underwriters; it does not mean that the notice of abandonment was accepted by the underwriters. If there is a constructive total loss, followed by notice of abandonment, that is, a valid notice of abandonment, then the loss dates back to the date of the casualty: see the observations of Lord Wright in *Robertson* v. *Petros N. Nomikos Ld.* (31).

[COHEN, L.J. But surely that view is inconsistent with the terms of s. 61 of the Marine Insurance Act, 1906. That section does not assist the view that the ship, in these circumstances, is res nullius.]

The very nature of a notice of abandonment, as shown by its name, is that it divests the property of the assured. And a valid notice of abandonment is a sufficient compliance with sub-s. 1 of s. 60. In this case the notice of abandonment was ratified by the owner after the purported exercise of the election to purchase by the charterers.

[COHEN, L.J. Can the owner set aside a contract made by the exercise of the charterers' option, by means of a subsequent ratification of an unauthorized notice of abandonment?]

I submit he can. The ratification dates back to the time of the giving of the notice.

[MORRIS, L.J. Would ratification be of any avail if a bill of sale had then been executed?]

Probably not: *Bird* v. *Brown* (32). The words in sub-s. 1 of s. 60, "On account of its actual total loss appearing to be "unavoidable", are said to depend on the state of knowledge of the insured at the time of abandonment. We submit that this is not so, but rather on the true facts as ultimately known at the date of the writ: see *Marstrand Fishing Co. Ld.* v. *Beer* (33).

What was the view of a reasonable man on September 6, when notice of abandonment was given to the underwriters, who knew the facts as to the condition of the vessel as proved at the trial? The vessel, worth 130,000*l.*, remained stranded, and was later sold for 1,275*l.* It was reasonably abandoned on account of its actual total loss appearing to be unavoidable or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been

(31) [1939] A. C. 371, 387.
(32) (1850) 4 Ex. 786, 799.
(33) (1936) 56 Ll. L. Rep. 163.

incurred. That being so, the passage from Lord Porter's speech in *Rickards* v. *Forestal Land Timber and Railways Co. Ld.* (34) does not hurt our client.

[SINGLETON, L.J. The charterers gave notice of abandonment. Why do you take on yourself the onus of showing why they did so? You may be entitled to assume that they did so under s. 60.]

Passing to sub-s. 2 of s. 60, I rely on note 6 to para. 1091 in Arnould on Marine Insurance (13th ed.): "For cases under "sub-s. 2 (i)" (of s. 60) "see *Hall* v. *Hayman* (35), *British* "*Dominions Gen. Ins. Co.* v. *Duder* (36). In both cases it was "not disputed that when a vessel is ashore on the rocks her "owners are deprived of the possession of her". The second case does not support the note, but the first does. Bray, J., found that the owner was deprived of possession of the vessel.

We have already dealt with s. 60, sub-s. 2 (i) (*b*), under the consideration of s. 60, sub-s. 1. As to s. 60, sub-s. 2 (ii), if it is impossible to repair the ship it is not an actual total loss, but a constructive total loss under this paragraph of the sub-section. Sub-s. 2 is not limited by the terms of sub-s. 1: see *Rickards* v. *Forestal Land Timber and Railways Co. Ld.* (34).

The effect of cl. 8 of the charterparty is that if, as is conceded, there was a constructive total loss on September 12, it is deemed to have occurred on September 5. If it were not so, the words in cl. 8, "such loss shall be deemed to have occurred on, and" would be unnecessary. The charterers argue that everything goes on as before, except that the charterers are relieved of hire payments after the date of the casualty; but that, it is submitted, leads to results so absurd that they could not have been intended by business men when formulating their contract. It would mean that if there were a casualty occurring immediately after the charterparty had begun to run, but the casualty did not result in a constructive total loss, the charterers would be entitled to go on using the vessel for months or years paying no hire for her and to exercise their option to purchase the vessel at a price diminished by the provisions contained in cl. 11. Again it would mean that if there were a casualty as a result of which there was a constructive total loss, but there was an election under s. 61 to treat it as a partial loss, hire-money would cease as from the date of the casualty, but the ship could be used without payment of

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(34) [1942] A. C. 50.

(35) [1912] 2 K. B. 5.

(36) [1914] 3 K. B. 835, reversed in C. A. [1915] 2 K. B. 394.

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hire by the charterers up to within three months of the expiration of the charterparty, and that they could then exercise their option to purchase the vessel. It is submitted that cl. 8 must be construed in such a way that if the vessel becomes a constructive total loss it does so as from the day of the casualty. Not only does hire cease, but all the provisions of the charterparty, including the charterers' option to purchase the vessel under cl. 11. Under cl. 8, once there is a constructive total loss, it is so for all purposes, even though treated under s. 21 as a partial loss by the assured vis-à-vis the underwriters: see *Robertson* v. *Petros M. Nomikos Ld.* (37).

[Morris, L.J. It may be that the word "hire" is used in the first sentence of cl. 8 as being hire-money and in the second sentence as "hiring".]

If that is so "the hiring"—the charterparty—ceased as from the date of the casualty. If that was so, there would be no necessity to imply a term in the charterparty, as is required; if we succeed on our third contention that to all intents the ship was destroyed on September 5, the commercial venture came to an end and the contract was frustrated.

On that issue, that of frustration, it is not necessary to show that the vessel was an actual total loss or a constructive total loss before 10 a.m. on September 7. It is clear that the principle of frustration of the adventure can apply to a time charter: see *Bank Line Ld.* v. *Arthur Capel & Co.* (38). This is the ground on which the trial judge decided the case. He found as a fact that the ship on its stranding had to all intents and purposes perished and that the principle laid down by Blackburn, J., in *Taylor* v. *Caldwell* (39) applied. As Greene, L.J., said in *Kulukundis* v. *Norwich Union Fire Insurance Society* (40): "The rule that "a shipowner is entitled to be freed from his obligations to the "freighter, if the vessel is lost in a commercial sense, is now well "established and it cannot, in my judgment, be treated as the "same rule, or a branch of the same rule, as that which applies "between owner and hull underwriter".

[Cohen, L.J. But cl. 8 defines what is to happen in the event of a constructive total loss. That is the difficulty I see on the point as to frustration. How then can the necessary term be implied in the charterparty, when there is an express term dealing with the issue?]

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(37) [1939] A. C. 371, 387.

(38) [1919] A. C. 435.

(39) 3 B. & S. 826; 32 L. J. (Q. B.) 164.

(40) [1937] 1 K. B. 1, 16.

That the parties define what is to happen on the occurrence of an event, which may be a frustrating event, is immaterial.

[COHEN, L.J. The court cannot consider the issue of frustration without considering the charterparty, because of the term which must be implied.]

There cannot be a continuing charterparty of a ship which is lost, and the court is forced to imply the required term in the charterparty.

[SINGLETON, L.J. Scott, L.J., said in the *Kulukundis* case (41): " The rule expressed in cases like *The Bessie Morris* (42) " that in commercial contracts commercial prevention is equiva- " lent to physical prevention has, therefore, to be harmonized " with this rule of holding a man to his contract though it be to " his own let or hindrance. Both rules are fundamental and the " solution must transgress neither. The way of escape from the " antimony in my view lies in a third principle of the law of " contract—that a contract may be intended by both parties to " be dependent for their mutual benefit upon some basic condition " such as the continued existence or availability of a particular " thing, or state of affairs, so that if the condition fails the " contract is discharged ".]

The implied term is not inconsistent with the provisions of cl. 8. See Lord Sumner's speech in *Bank Line Ld.* v. *Arthur Capel & Co.* (43), where he said (44): " A contingency may be " provided for, but not in such terms as to show that the provision " is meant to be all the provision for it "; and also that of Lord Wrenbury, where he said (45): " A term cannot be implied which " is inconsistent with an express term of the contract; but it is " no objection that it enlarges or adds to the express terms; every " implied term does that ". In *Gulnes* v. *Imperial Chemical Industries Ld.* (46) the ship was less of a wreck than the *Empire Gladstone*, yet Goddard, J., spoke of her as destroyed as a cargo-carrying ship and stated (47): " Here you have a frustration by " the destruction of the subject-matter which the parties must " have contemplated would always remain in existence ". The issue is, as it was put in *Court Line Ld.* v. *Dant and Russell Inc.* (48), " what was the effect upon this adventure ", in that case " of the closing of the Yangtze by the boom ", in this case by the stranding of the vessel. It was the end of the commercial

(41) [1937] 1 K. B. 1, 41.
(42) [1892] 2 Q. B. 652.
(43) [1919] A. C. 435.
(44) Ibid. 456.
(45) Ibid. 462.
(46) (1937) 43 Com. Cas. 96.
(47) Ibid. 101.
(48) (1939) 44 Com. Cas. 345, 351.

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adventure, the ship being destroyed to all intents and purposes, as the trial judge found. See also the observations of Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.* (49) on frustration and those of Lord Wright in *Denny, Mott and Dickson Ld.* v. *James B. Fraser & Co. Ld.* (50).

Lastly, if our contentions are wrong and the charterers were entitled to exercise this option, the Minister nevertheless is entitled by reason of the terms of the charterparty to retain the benefit of the policies.

Ashton Roskill, K.C., replied.

Cur. adv. vult.

July 30. The following judgments were read:—

Cohen, L.J. Mr. Scott Cairns has sought to support the judgment of the judge by three arguments which he said were the same as those which he had addressed in the court below. They were as follows:—First, he said the vessel was an actual total loss at 7.55 p.m. local time on September 5, or at any rate before 10 a.m. British Summer Time on September 7, 1950. If he was right on this point, it was common ground between the parties that the defendant was entitled to succeed. The judge does not appear to have decided the point, though in dealing with the question whether there was a constructive total loss he did say that by September 6 the position was quite hopeless.

Secondly, Mr. Scott Cairns said that the vessel was a constructive total loss and that this was sufficient to entitle him to succeed. The judge certainly considered the question of constructive total loss, for he said: "What I have to see is whether this "vessel was a constructive total loss at the moment when the "option was exercised". He does not express a clear finding on this matter, for he then proceeds to the question of frustration, referring to the case of *Taylor* v. *Caldwell* (51) and citing a passage from the judgment of Blackburn, J., which is to be found in Smith's Leading Cases (13th ed.), vol. 2, at p. 611, as follows: "The principle seems to us to be that, in contracts of which the "performance depends on the continued existence of a given "person or thing, a condition is implied that the impossibility "of performance arising from the perishing of the person or thing "shall excuse the performance". He returns to the question of the condition of the ship as at 10 a.m. British Summer Time on September 7, 1950, and says he had no doubt that, after notice of abandonment had been given on September 6, the vessel, the subject-matter of the charterparty, had to all intents and purposes been destroyed.

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(49) [1926] A. C. 497, 509.

(50) [1944] A. C. 265, 276.

(51) 3 B. & S. 826: 32 L. J. (Q. B.) 164.

I am unable, however, to treat this passage as a clear finding on the question of constructive total loss, for as I read the judge's judgment he was deciding in Mr. Scott Cairns' favour on the basis of his third argument, which was as follows: The vessel was, before 10 a.m. British Summer Time on September 7, incapable of further use as a ship, and would never again be capable of such use, and accordingly the commercial purpose of the charterparty had been frustrated and both parties were discharged from its further performance. That this was the basis of the judge's decision appears, I think, from other passages in his judgment. He cites a passage from Scrutton on Charterparties (14th ed.), at p. 112, art. 30 (52), which reads as follows: "Apart "from any question of breach of contract, and under a different "principle, circumstances which delay its performance may "destroy the rights and obligations of both parties to the con"tract in a charterparty, or in a bill of lading. This, in regard "to charterparties, is commonly referred to under the phrase "'frustration of the commercial purpose of the adventure', but "is really a particular application of the more general principle "that a contract which by supervening and unforeseen circum"stances becomes impossible of performance may cease to bind "either party to it. The contract in such a case comes to an end "by virtue of an implied term in it. It is for the court to find "the existence of the implied term as a matter of construction. "If an event makes the implied term operative, the contract is "automatically terminated thereby, and not by reason of the "election of either party". The judge then said: "That I think "is the principle which I have to deal with in this case. . . . I "think that the whole foundation of this charterparty is, ex "necessitate, the continued existence of the vessel which was "being let on time charter under that document, but that seems "to me to leave two questions for consideration, questions which "I have not yet touched upon". In other words, he is saying: "Subject to two points which I have still to consider, I should "decide in the defendant's favour on the ground of frustration".

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(52) See now art. 31 at p. 106 of the 15th edition.

He then proceeds to consider those two points, which were as follows:—(1.) Did cl. 8 of the charterparty, providing, as it clearly did, for the cesser of hire on the occurrence of a loss (actual or constructive), exclude the implication of a term by which the charterparty was automatically terminated on the frustration of the commercial purpose of the adventure? (2.) Was the option provision a contract independent of the hiring and other provisions, so that it might survive although the rest of the charterparty had ceased to operate? The judge answered both these questions in favour of the defendant, and said that that was sufficient to dispose of that branch of the case.

Mr. Roskill in his able argument challenged that conclusion. He did not pursue the contention that the option provision was a contract independent of the rest of the provisions in the document. He agreed with the judge that the effect of cl. 8 of the agreement was to put an end to the liability for the hire-money from the date of the casualty in the event of actual or constructive total loss, but he argued that, (a) the provisions of cl. 8 taken by itself, or at any rate when read with other clauses of the agreement, in particular cll. 1 (5), 7 and 10, excluded the implication of the provision which the principle of frustration requires, and (b) even if the implication was not excluded, the contract had not been frustrated before 10 a.m. British Summer Time on September 7.

The construction of cl. 8 presents some difficulty. The judge, I think, regarded it only as putting an end to the liability of the charterers to pay hire-money as from the date of the casualty whether the loss be actual or constructive. I incline to the view that it has a wider effect. If its effect was limited as the judge thought, and incidentally Mr. Roskill argued, the words in the second sentence, "such loss shall be deemed to have occurred "on and", would be otiose. In my opinion the intention and effect of the clause was to place constructive loss on the same basis as actual loss. It is admitted that in the event of actual loss the charterparty would have been brought to an end and the option conferred by cl. 11 would no longer have been exercisable. I think the intention of cl. 8 was to produce the same result in the event of constructive loss. The point is by no means clear, but I think that in any event there is nothing in cl. 8 which would exclude the implication of the clause required if the doctrine of frustration is to apply, namely, that the contract comes to an end, if the fulfilment of the commercial purpose of the charterparty is rendered impossible. See the case of *Joseph Constantine*

Steamship Line Ld. v. *Imperial Smelting Corporation Ld.* (53), where Viscount Simon, L.C., says (54): "Every case in this "branch of the law can be stated as turning on the question "whether from the express terms of the particular contract a "further term should be implied which, when its conditions are "fulfilled, puts an end to the contract".

The application of the principle of frustration to a time charter was considered by the House of Lords in the case of *Bank Line Ld.* v. *Arthur Capel & Co.* (55). In that case the charterparty contained a provision (cl. 31), amongst others, that the charterers should have the option of cancelling should the steamer be commandeered by the Government during the currency of the charter. Before delivery of the steamer she was requisitioned by the Government, but the plaintiffs did not exercise their option to cancel. It was held, none the less, that the application of the principle of frustration was not excluded by the special terms of the charterparty, and that the requisition and detention of the steamer, for a considerable period, destroyed the identity of the charter service and entitled the defendants (the owners) to treat the charterparty as at an end. Lord Sumner said (56): "The "theory of dissolution of a contract by the frustration of its "commercial object rests on an implication, which arises from "the presumed common intention of the parties. 'Where the "'contract makes provision' (that is, full and complete provi"sion, so intended) 'for a given contingency it is not for the "'court to import into the contract some other and different "'provision for the same contingency called by a different "'name': Bailhache, J. (57). This is a matter of construction "according to the usual rule. A contingency may be provided "for, but not in such terms as to show that the provision is meant "to be all the provision for it. A contingency may be provided "for, but in such a way as shows that it is provided for, only for "the purpose of dealing with one of its effects and not with all". Lord Sumner later considered the effect of cl. 31, and said (58): "It means that, if the Admiralty should requisition the ship, the "charter may be forthwith cancelled by the charterers, without "waiting to see or having to show that its object is thereby "frustrated. This is a separate provision from that which the "appellants seek to imply, and is not inconsistent with it".

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(53) [1942] A. C. 154.
(54) Ibid. 164.
(55) [1919] A. C. 435.
(56) Ibid. 455.
(57) In *Admiral Shipping Co. Ld.* v. *Weidner, Hopkins & Co.* [1916] 1 K. B. 429, 438.
(58) [1919] A. C. 435, 456.

Lord Wrenbury said (59): "A term cannot be implied which is "inconsistent with an express term of the contract; but it is no "objection that it enlarges or adds to the express terms; every "implied term does that. The express terms of this contract "relevant in this respect are only articles 26 and 31. They are "terms which entitle the charterers to cancel in certain events. "There is no inconsistency in an implied term which entitles "either party to treat the contract as at an end if the date of "commencement of the contractual year is by reasons beyond "their control postponed beyond a reasonable time".

Our attention was called to a number of other cases on frustration. I need not refer to them all. I will make just two citations. The first is from the judgment of Scott, L.J., in *Kulukundis* v. *Norwich Union Fire Insurance Society* (60): "The "rule expressed in cases like *The Bessie Morris* (61) that in "commercial contracts commercial prevention is equivalent to "physical prevention has, therefore, to be harmonized with this "rule of holding a man to his contract though it be financially to "his own let or hindrance. Both rules are fundamental and the "solution must transgress neither. The way of escape from the "antimony in my view lies in a third principle of the law of "contract—that a contract may be intended by both parties to be "dependent for their mutual benefit upon some basic condition, "such as the continued existence or availability of a particular "thing, or state of affairs, so that if the condition fails the contract is discharged, or at any rate becomes unenforceable".

The next is from the speech of Viscount Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.* (62): "Language is "occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or "rescission of contracts. The analogy is a false one. Rescission "(except by mutual consent or by a competent court) is the right "of one party, arising upon conduct by the other, by which he "intimates his intention to abide by the contract no longer. It "is a right to treat the contract as at an end if he chooses, and "to claim damages for its total breach, but it is a right in his "option and does not depend in theory on any implied term "providing for its exercise, but is given by the law in vindication "of a breach. Frustration, on the other hand, is explained in "theory as a condition or term of the contract, implied by the "law ab initio, in order to supply what the parties would have

(59) [1919] A. C. 435, 462.
(60) [1937] 1 K. B. 41.
(61) [1892] 2 Q. B. 652.
(62) [1926] A. C. 497, 509.

"inserted had the matter occurred to them, on the basis of what "is fair and reasonable, having regard to the mutual interests "concerned and of the main objects of the contract: see *per* Lord "Watson in *Dahl* v. *Nelson, Donkin and Others* (63). It is "irrespective of the individuals concerned, their temperaments "and failings, their interest and circumstances. It is really a "device by which the rules as to absolute contracts are reconciled "with a special exception which justice demands".

Applying the principle laid down in these cases to the present case, I see nothing inconsistent with any of the clauses relied on in implying a provision that, in the event of the further use of the ship for the purposes of the charter becoming commercially impossible, the contract should automatically be brought to an end. So far as hire-money is concerned, the implication of this clause merely adds an event to those specified in cl. 8 as putting an end to the liability to pay hire.

Clause 1 (5) is dealing with an event before delivery, and provides for the contract becoming null and void ab initio, which does not to my mind touch the question of frustration. Clause 10 is analogous to cl. 31 in *Bank Line Ld.* v. *Arthur Capel & Co.* (64), since it provides for the charterparty expiring on the ship being requisitioned, whether or not the object of the charterparty is thereby frustrated, and quite independently of the period for which the requisition lasts. Clause 7 is said to be inconsistent with the application of the doctrine of frustration, because that doctrine puts an end to the further performance of the charterparty, whereas cl. 7 contemplates the continuation of the liability of the charterer to indemnify the owner against any sum which the owner shall pay in respect of the removal of the wreck if the ship becomes a wreck. The answer to this point is, I think, that frustration does not put an end for all purposes to the obligation of the charterers. Thus, they remain liable for hire-money accrued, but not paid before the date of frustration. The liability of the charterers under cl. 7 seems to me analogous to their liability for hire-money accrued due but unpaid at the date of frustration. Looking at the contract as a whole, it seems to me not only that there is nothing in the terms of the contract inconsistent with the implication of a term that the commercial impossibility of the further performance of the purposes of the charterparty shall put an end to it, but that the implication of such a term is the natural corollary of cl. 8.

(63) (1880–1) 6 App. Cas. 38, 59.

(64) [1919] A. C. 435.

There remains the question whether or not as a matter of fact the charterparty was commercially frustrated before 10 a.m. British Summer Time on September 7. The judge has found that it was so frustrated, and I agree with the conclusions he reached. The telegrams received in London, before the charterers instructed the brokers to give notice of abandonment, showed how serious was the damage, and stated that the vessel was not immediately salvageable and that the feasibility of a major salvage operation was doubtful. The captain's letter of September 9 stated that his inspection at dawn on September 6 convinced him that it would be impossible to tow the ship off, and, even if the towing attempt was successful, it was very doubtful whether the ship would remain afloat. The ultimate report of the surveyor stated " that the condition of the vessel had remained practically " unaltered from the time she grounded until the survey was " made ". In these circumstances I am not prepared to differ from the judge on this question of fact. On the contrary, I think that the ship had, before September 7, been, to use the language of Goddard, J., in *Gulnes* v. *Imperial Chemical Industries Ld.* (65), " destroyed as a cargo-carrying ship ". In the result, I agree with the conclusion reached by the judge, and substantially for the same reasons as those that he gives on my interpretation of them. Like him, I do not propose, in these circumstances, to express an opinion as to whether or not there was an actual or constructive total loss before 10 a.m. British Summer Time on September 7, or whether, if the loss were constructive, that fact automatically brought an end to the charterparty and prevented the exercise of the right of option.

There is, however, one other point to which I ought to allude. Mr. Scott Cairns, in the course of his argument as to the effect of a notice of abandonment, referred to and relied on a statement in para. 1213 on p. 1114 of the 13th edition of Arnould on Marine Insurance to the effect that if notice of abandonment is given, but not accepted, the property becomes res nullius. That statement was said in the note on that page to be based on a decision of Bailhache, J., in *Boston Corporation* v. *France, Fenwick & Co. Ld.* (66), and reference was made in that note to two other cases. The decision of Bailhache, J., undoubtedly supports the statement, but the cases of *Allgemeine Versicherungs-Gesellschaft Helvetia* v. *Administrator of German Property* (67) and *Oceanic*

(65) 43 Com. Cas. 96, 101.

(66) 28 Com. Cas. 367.

(67) [1931] 1 K. B. 672.

Steam Navigation Co. Ld. v. *Evans* (68) do not do so. The first-mentioned case seems irrelevant, and the second case, far from supporting it, contains a statement by Greer, L.J. (69), which is inconsistent with it. Greer, L.J., said: " It does not follow " that, because notice of abandonment is given to an insurer, " therefore the vessel which may have some value, is abandoned " to all the world, or that it has no owner at all, and becomes " what lawyers prefer to describe, using the Latin language, as " res nullius ". That expression of opinion was obiter, and it is not necessary for me to reach a conclusion on the matter, but the view expressed by Bailhache, J., seems to me difficult to reconcile (a) with the option given to the assured by s. 61 of the Marine Insurance Act, 1906, to treat the loss as a partial loss, and (b) with the doctrine of ademption of loss explained in Chalmers' Marine Insurance Act, 1906 (4th ed.), at p. 89. My inclination, therefore, is to prefer the opinion expressed by Greer, L.J., to that of Bailhache, J.

Mr. Scott Cairns also sought to contend that if he was wrong on the main point, and the plaintiffs were entitled to exercise their option, his client, none the less, was entitled to retain the benefit of the policies. If this were right the plaintiffs would be liable to pay the purchase price payable by reason of the exercise of the option, and would get neither a usable ship nor the benefit of the policies. This would be a travesty of justice, and it seems to me implicit in the agreement that the benefit of the policy is intended to belong to the owner of the ship for the time being, whoever he might be.

For the reasons I have given I would dismiss the appeal.

SINGLETON, L.J. The charterers sought to exercise the option to purchase the ship by letter bearing date September 6, 1950, which was delivered by hand at 10 a.m. on September 7. The question to be determined is whether the option was still open at that time, having regard to what had happened.

The ship ran aground on Ioala Point, 196 miles south of Sydney Heads, on September 5, and a cable to that effect (and adding that she was hard aground and pounding heavily) was received in London at 3.55 a.m. on September 6. At first it was thought that there was a chance of refloating her with the help of tugs, but a cable sent from the ship at 7 a.m. on September 6 showed: " Position now serious. Forepeak and holds one and

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(68) 40 Com. Cas. 108.

(69) Ibid. 111.

"two full water also all double-bottom tanks full except four "five and six dry. Starboard side number seven making water "slowly. Wing deep tank dry. Making water shaft tunnel. "Apparently hard aground from forward to shaft amidships. "Very doubtful if tug can tow ship off. Also doubtful if remain "afloat if towed off. Engines disabled". On this the Sydney agents cabled to the charterers: "*Gladstone* advises position "serious, water most holds, engines disabled, not much hope. "Advised master leave his discretion land crew. Acting conjunction Lloyds agents salvage officer proceeding immediately". This was received 3.30 a.m. September 6 (London time). At 3.40 p.m. a cable from the master reached London, and it was in these terms: "Position now serious. Forepeak and holds one "two full water, also all double-bottom tanks full except four, "five, six dry starboard side, making water shaft tunnel, apparently hard aground from forward to abaft amidships. Engines "disabled and stern post broken. Tug not here yet but very "doubtful if remain afloat if towed off. Weather fine, moderate "swell, ship pounding heavily". Meantime the Sydney agents had advised the master that the question of landing the crew was left to his discretion, and they had cabled to the charterers saying: "Preliminary examination definitely indicates vessel not "immediately salvable, detailed examination being carried out to "determine if major salvage operation feasible which consider "doubtful", received in London 3.25 p.m. September 6. On the same September 6 the charterers wrote to the insurance brokers instructing them to give notice of abandonment of their interest. This was communicated to the underwriters on the same day, and the underwriters declined to accept abandonment.

It was in these circumstances that the charterers wrote the letter purporting to exercise the option to purchase the *Empire Gladstone*. On the same September 7 they wrote to the London Steamship Owners Mutual saying: "From messages received it "appears that the vessel may become a total loss". Further messages showed that the position was getting worse. On September 8 the Ministry of Transport wrote to the charterers pointing out that it appeared from the reports that: "The vessel "is, or is about to become, a constructive total loss, in which "case the loss of the ship will, in accordance with the provisions "of cl. 8 of the charterparty, be deemed to have occurred on "the day of the casualty resulting in the loss", and adding that the charterparty ceased to apply and that the notice to exercise the option was without effect. It was also said that the Minister had confirmed to the underwriters that he had abandoned the ship. This the Minister did by letter of September 8.

By September 9 all cargo except iron ore had been landed. Eleven firemen had been taken ashore; the rest of the crew remained aboard awaiting developments. A letter of that date from the master contains this passage: "An inspection at dawn "on 6th instant convinced me that it would be impossible to tow "the ship off, and even if the towage attempt was successful it "is very doubtful whether vessel would remain afloat. I radioed "this information to Messrs. McIlwraiths, consequently they "decided not to send any more tugs, and it is as well that they "did come to this decision as the No. 2 hold filled with water "also. In fact No. 1 and No. 2 holds are tidal". Lloyds agents at Sydney reported on September 10, on diver's inspection: "Considers prompt salvage vessel impossible. Owing rocky "ground very exposed position vessel and evident badly damaged "ship's bottom considers prospects ultimate salvage negligible". By September 12 all the crew had abandoned the vessel. On September 20 the underwriters accepted an offer of 1,275*l.* for the wreck.

I have referred to some of the cables. I do not think it is necessary to refer to more, nor do I think it necessary to refer in detail to the reports received subsequently, or to the extracts from the master's notebook. The impression I gain from the whole of the documents is that the position was really hopeless from the first: it was not realized that this was so on the night of September 5, but it was fairly clear to the master on the morning of September 6, as shown by his letter of September 9, and this he sought to convey in the various messages he sent. And that the charterers appreciated it is shown, I think, by the fact that they instructed the brokers to give notice of abandonment on September 6. They were not further interested in the vessel; but it occurred to someone afterwards that if they exercised the option to purchase the ship for around 103,000*l.* (assuming that the option was still open) they might be able to take unto themselves the policy moneys, 130,000*l.* It is only right to say that they had been considering exercising the option, but so far they had not succeeded in making the necessary arrangements.

A number of points were taken on both sides. Let me deal first with two which were taken on behalf of the Ministry. It was submitted: (a) that on September 6 the vessel was an actual total loss; and (b) that alternatively she was on that day a constructive total loss. As to (a), I am satisfied that it was not shown that on September 6 the vessel was an actual total loss. Croom-Johnson, J., did not so find. It cannot be said that at that time the vessel was destroyed or so damaged as to cease to be a ship, nor can it be said that the assured was irretrievably deprived thereof. The crew were still aboard and in charge of the ship. As to (b): if the question depends on the definition in s. 60 of the Marine Insurance Act, 1906—and the parties seemed to be in agreement on this—it is equally impossible to say that on September 6 the vessel was a constructive total loss within the words of the definition.

There are other points for consideration. I propose to deal with two only, either of which is (or both of which are) in my view sufficient to defeat the plaintiffs' claim. The first arises on cl. 8 of the charterparty, which is in these terms: "If the ship "be lost, hire shall be paid up to and inclusive of the day of loss, "or, if missing, up to and inclusive of the day last reported. "Should the ship become a constructive total loss, such loss shall "be deemed to have occurred on and hire under this charterparty "shall cease as from the day of the casualty resulting in such "loss. In ascertaining whether the ship is a constructive total "loss for the purpose of this clause, the insured value under cl. 7 "shall be taken as the repaired value, and nothing in respect of "the damaged or breaking up value of the ship shall be taken "into account". It is said by Mr. Roskill that this clause relates only to payments by way of hire, and that it is to enable the charterers in the event of loss or of constructive total loss to recover payments made in advance. That is a possible reading of it, though—a small point—it would make the words "such "loss shall be deemed to have occurred on and" surplusage. I am inclined to the view that the clause should be read as showing that the intention of the parties was that in the event of a constructive total loss of the vessel the charterparty should be deemed to have come to an end as at the date of the casualty. It does not help towards construction of the clause, but that would appear to be the view which the charterers held when they instructed the brokers to give notice of abandonment of their insured interest on September 6. The notice itself does not carry the position further as between them and the underwriters, as it was declined, but it does serve to indicate their view of the position. The object of the clause I conceive to have been to enable both owners and charterers to know where they stood in the event of a constructive total loss. As from the date of the casualty it was to be just the same as it would have been in the case of an actual total loss. The charterparty does not say in so many words that in the event of the ship being lost the charterparty shall be at an end, though it does say that in such case hire shall be paid up to and inclusive of the day of loss. A constructive total loss is treated in the same way in cl. 8: it is provided that it shall be deemed to have occurred on the day of the casualty, which was the date of the stranding, September 5, and hire was to cease as from that day. It seems to me that the object of this is to give a date on which the charterparty is to be deemed to have expired, except in the case of something for which express provision is made, for example, in the case of the ship becoming a wreck or obstruction. The ship admittedly became a constructive total loss on September 12, and it is claimed by the defendant that by reason of cl. 8 this dates back to September 5 for all purposes. I do not think that s. 61 of the Marine Insurance Act, 1906, affects the position as between owners and charterers. The latter, by instructing the brokers to give notice of abandonment of their interest, showed that they regarded the adventure as at an end. I recognize that cl. 8 is in somewhat ambiguous terms, but, as I have said, I consider that it was seeking to make the case of a constructive total loss analogous to that of a loss, and was fixing a date therefor.

I now come to the second point which arises out of the doctrine of frustration. It is not possible to consider this without giving full effect to the provisions of the charterparty, and in particular to cl. 8, and that is why I have dealt with the defence raised under cl. 8 first. If that clause merely relates to rent (or hire), and to nothing else, it is necessary to imply other terms into the contract between the parties. There is, as I have said, no provision as to what shall happen in the event of total loss except that hire shall be paid up to the date of loss; and in that context "hire" means the amount due by way of rent. There is provision in the event of requisition by the Crown (cl. 10) and there is provision in the case of the ship becoming a wreck or obstruction (cl. 7). It is clear from the decision of the House of Lords in *Bank Line Ld.* v. *Arthur Capel & Co.* (70) that the principle of frustration of the adventure applies to a time charter. It seems to me that one must imply into the contract between the parties

(70) [1919] A. C. 435.

that the ship must remain capable of carrying out the purposes for which she was hired; in other words, if her use for the purposes of the hire became impossible during the continuance of the term for which she was hired, the charterparty automatically came to an end. I am content to rest my judgment on the test put by Scott, L.J., in a different class of case, "Whether the facts in "evidence are sufficient to establish a commercial loss of the "'ship' judged by the charterparty criterion" (71). There is nothing in this inconsistent with the terms of the charterparty itself. Indeed, cl. 8 supports the view I have formed.

Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.* (72) said: "Frustration, on the other hand, is explained in "theory as a condition or term of the contract, implied by law "ab initio, in order to supply what the parties would have "inserted had the matter occurred to them, on the basis of what "is fair and reasonable, having regard to the mutual interests "concerned and of the main objects of the contract". If the ship had become a total loss the parties would have regarded the contract as at an end, and the fair inference from cl. 8 is that they intended the same, if she became a constructive total loss, and that that should count as from the date of the casualty. In *Gulnes* v. *Imperial Chemical Industries Ld.* (73) Goddard, J., spoke of the ship as "destroyed as a cargo-carrying ship", and added: "Here you have a frustration by the destruction of the "subject-matter which the parties must have contemplated would always remain in existence". To put a question like that put by Branson, J., in *Court Line Ld.* v. *Dant and Russell Inc.* (74): what was the effect upon this adventure of the stranding of the ship on September 5? It may be that on September 5 the answer was uncertain, but there could be no doubt about it on September 6. The inspection at dawn had convinced the master that it would be impossible to tow the ship off. There was no hope of her being able to carry out the purpose for which she was chartered, during the currency of the term, or at all.

I am ready to accept the submission that she was not then an actual total loss or a constructive total loss within the definitions of those terms in the Marine Insurance Act, 1906. None the less, she was unfit for the purposes for which she was chartered, and there was no possibility of her being made fit. Such I believe was the finding of Croom-Johnson, J., when he said that "to all

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(71) *Kulukundis* v. *Norwich Union Fire Insurance Society* [1937] 1 K. B. 1, 42.

(72) [1926] A. C. 497, 510.

(73) 43 Com. Cas. 96, 101.

(74) 44 Com. Cas. 345, 351.

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"intents and purposes the subject-matter of this charterparty "had been destroyed". If cl. 8 of the charterparty does not cover this case, I would point out that there is something left quite uncovered by the charterparty. This ship, stranded on the rocks, not yet a total loss and not a constructive total loss, according to the definition of s. 60, was on September 6 in such a state that she could not again be used for the purposes of the charter. There must, I think, be implied into the contract a term to the effect that in those circumstances the charterparty was at an end, and as Scott, L.J., put it in *Kulukundis* v. *Norwich Union Fire Insurance Society* (75), the charterparty contract was ipso facto discharged. That I believe to be in line with cl. 8, and the act of the charterers in giving notice of abandonment of their interest showed their view of the position. The option to purchase was not open to the charterers on September 7, and this appeal fails.

Morris, L.J. [His judgment was read by Singleton, L.J.] The basis of the claim made by the charterers was that they had validly exercised their option to purchase the ship which was the subject of the demise charterparty dated August 2, 1946. The option was given by cl. 11 in the following terms: "The charterers "shall have the option to be exercised by notice in writing given "to the owner not later than three months before the expiration of "this charterparty to purchase the ship as she then lies for the "sum of 130,000*l*. (basic price for purchase) less depreciation at "the rate of 5 per cent. per annum for the period between the "date of delivery hereunder and the date of transfer of the ship "to the charterers". By their choice of the words of this clause the charterers and the owner clearly contemplated that the option was to purchase a ship which should be capable of transfer. The appellant charterers handed their notice in writing to the respondent owner, by which they purported to exercise their option, at 10 a.m. on September 7, 1950.

It becomes necessary to consider in the first place whether at that time the steamship *Empire Gladstone* was in existence so as to be capable of transfer, and, secondly, whether the charterers then possessed a contractual right to exercise their option. The answer to the first of these two inquiries must be arrived at by an examination of the facts. The inquiry is in effect whether before September 7 the ship was an actual total loss. If the ship

(75) [1937] 1 K. B. 1, 41.

was a constructive total loss it would still be capable of transfer. The events are narrated in the judgment of the trial judge now under review, and the cables record not only the facts as ascertained from time to time but also the views and forecasts of those who were on or who went on to the ship. It is to be noted that the master and the crew, apart from certain firemen, remained on the ship to await developments until September 12. The discharge of certain cargo consisting of motor bodies and parts which had been loaded on deck and between decks continued by ship's gear between September 7 and 9. On September 12 the master and crew left the ship. A consideration of the available evidence does not lead me to the conclusion that on September 7 the ship was no longer in existence (whether a constructive total loss or not) as a ship capable of transfer.

The next inquiry is as to whether at 10 a.m. on September 7 the charterers possessed a contractual right to exercise their option to buy. In considering this matter it is not, in my judgment, correct to say that only the events prior to that moment of time are to be regarded. For the purposes of cl. 8 of the charterparty it is clear that in ordinary circumstances the effect of the occurring of a " casualty " depends upon the subsequent events. Thus, if the ship were holed as the result of a peril insured against and after the lapse of some days became a constructive total loss, it is the happening of the latter event which determines, by reason of cl. 8, that the payment of hire is to cease from the date of the earlier event. The position is no different where, as in the present case, the charterers have purported to exercise their option between the date of the casualty and the date when, ex concessis, the ship became a constructive total loss. It is agreed, and is common ground, that there was a casualty on September 5 and that that casualty resulted in a constructive total loss by or on September 12. The Minister contends and the charterers deny that there was an actual total loss, or alternatively a constructive total loss, by 10 a.m. on September 7. If the validity of the exercise of the option is being considered by reference to the position at 10 a.m. on September 7, then it cannot be ignored that the contract has provided that the effect of what happened on September 5 falls to be determined by the course of subsequent events. In the letter of September 8, written for the Minister in reply to the notice of exercise of the option, it was stated: " However, it appears from reports that " this vessel is, or is about to become, a constructive total loss, "in which case the loss of the ship will, in accordance with the "provisions of cl. 8 of the charterparty, be deemed to have "occurred on the day of the casualty resulting in the loss. It "would appear, therefore, that the charterparty, including cl. 11 "(option to purchase) ceased to apply from the day of the "casualty so that the notice of your desire to purchase the ship "given in your letter of September 6 was without effect". The point taken in the first sentence that I have quoted, to the effect that if after the notice the ship became a constructive total loss cl. 8 would apply, is, I consider, correct. Whether the contention advanced in the second sentence which I have quoted has validity calls for further and fuller consideration. It becomes necessary to look at the terms of the charterparty in order to consider whether the parties had decided what was to happen in various contingencies. If the parties had prevision, and made provision, then their agreement is not to be altered.

In *Bank Line Ld.* v. *Arthur Capel & Co.* (76) Lord Sumner quoted with approval words used by Bailhache, J., in *Admiral Shipping Co. Ld.* v. *Weidner, Hopkins & Co.* (77), as follows: "Where the contract makes provision for a given contingency "it is not for the court to import into the contract some other "and different provision for the same contingency called by a "different name". Lord Sumner pointed out that that meant "full and complete provision so intended". Lord Sumner went on to say: "A contingency may be provided for, but not in such "terms as to show that the provision is meant to be all the "provision for it. A contingency may be provided for, but in "such a way as shows that it is provided for, only for the purpose "of dealing with one of its effects and not with all". In the same case Lord Wrenbury said (78): "A term cannot be implied "which is inconsistent with an express term of the contract; but "it is no objection that it enlarges or adds to the express terms; "every implied term does that".

Since it is admitted that on any view the ship was a constructive total loss on September 12 following upon the casualty of September 5, the effect of the second sentence of cl. 8 of the charterparty is that the constructive total loss is deemed to have occurred on September 5, and hire ceased as from that date. There is a contrast between the words "hire shall be paid up to" which appear in the first sentence of cl. 8, and the words "hire "under this charterparty shall cease as from" which appear in

(76) [1919] A. C. 435, 455, 456.
(77) [1916] 1 K. B. 429, 438.
(78) [1919] A. C. 435, 462.

the second sentence. It is arguable that the word "hire" in the first sentence denotes hire-money, and that the word "hire" in the second sentence, where it is followed by the words "under "this charterparty", denotes the hiring. Mr. Roskill submitted that the word "hire" when used as a noun in this charterparty is simply used to denote hire-money. This submission is probably correct, and I propose to proceed on the basis that it is.

If it is said that the parties have by cl. 8, in reference to the contingency of a constructive total loss following upon a casualty, merely provided for the cessation of hire, then certain questions may arise to which in express terms the charterparty gives no answers. Two examples will suffice. Firstly, there is a casualty to the ship resulting in the ship becoming a constructive total loss. As from the date of the casualty, hire ceases. The owner decides in the exercise of the option given him by s. 61 of the Marine Insurance Act, 1906, to treat the loss as a partial loss. The ship is repaired at a cost which involves the owner in considerable outlay. Can the charterer claim to have the free use of the ship for the remainder of the five-year period and to exercise an option to purchase? Secondly, with similar initial facts, the owner decides to serve a notice of abandonment upon underwriters. The underwriters accept the notice. Can the charterer claim to exercise the option to purchase and hold the owner liable in damages for a failure to transfer the ship?

I have come to the conclusion that it is necessary to imply a term in the charterparty to the effect that as from the time when hire-payments cease to be due the charterparty terminates. Such termination would end the hiring, and its date would mark "the expiration" of the charterparty in substitution for the contemplated date at the end of a period of five years. Hire-money is payable for the hiring, and when hire-money ceases to be payable—as opposed to merely being in suspense—this is for the reason that the hiring has ceased and the charterparty has expired. Accrued obligations would, however, be unaffected. Thus, it is provided in cl. 7 that: "In the event of the ship becoming a "wreck or obstruction to navigation the charterers shall indem-"nify the owner against any sums which the owner shall become "liable to pay and shall pay in respect of the removal or destruc-"tion of the wreck or obstruction under statutory powers". The liability of the charterers would be the same whether the event of the ship becoming a wreck or obstruction to navigation took place in relation to the contemplated expiration date or the substituted expiration date.

Attention was called to certain express provisions in the charterparty. Thus, cl. 1, sub-cl. 3, provides that: " Should the " ship not be delivered before October 31, 1946, the charterers, " by notice in writing given to the owner not later than fourteen " days after that date, shall be entitled to cancel this charter-" party ". Clause 1, sub-cl. 5, provides that: " Should the " ship become an actual or constructive total loss before delivery " hereunder, this charterparty shall become null and void ". These two provisions are in relation to the time before delivery. They throw no light upon the topic as to what is the position when hire-payments cease after a casualty resulting in a constructive total loss. Neither is there anything in the provisions inconsistent with the view which I have expressed. Nor is this the case with cl. 10 of the charterparty, which reads: " Nothing " in this charterparty shall operate to impair the Crown's right " to requisition the ship at any time, and in the event of the " exercise of such right this charterparty shall thereupon expire ".

On the agreed facts, to the extent that they are agreed, in the present case, the result of the term which must in my judgment necessarily be implied is that the expiration date of the charterparty was September 5, 1950. On any view, and by express admission, there was a constructive total loss by or on September 12. The parties' agreement as embodied in their charterparty brings about the result that such constructive total loss must be regarded as having occurred on September 5, and hire under the charterparty ceased as from that date. It was their common intention that hiring under the charterparty should cease as from that date, or, in other words, that the charterparty should expire. If the words of cl. 8 do not express this common intention, which is to be deduced from a consideration of the charterparty as a whole, then words must necessarily be implied which will clothe and formulate it. It is provided by cl. 6 that the charterers are to maintain the ship in the class which is appropriate to her. This obligation could not remain if the ship became a constructive total loss and its abandonment was accepted by underwriters. It is provided by cl. 7 that all risk of the ship is to be borne by the charterers throughout the charterparty. This clause could not operate if the ship became a constructive total loss and its abandonment was accepted by underwriters. In my judgment the parties contemplated that if the ship became a constructive total loss she would then become at the disposal of the owner, who could decide in which way to exercise the right of election given by s. 61 of the Marine Insurance Act. The parties further agreed that if a casualty resulted in a constructive total loss such loss should be deemed to have occurred on the date of the casualty. That date would then mark the end of the demise of the ship.

For the reasons which I have expressed, my conclusion is that the admitted facts bring about the result that at the time of their purported exercise of the option the charterers no longer enjoyed the right to exercise it. The view which I have formed makes it unnecessary to express a conclusion as to whether, apart from the relation back, contractually effected, of the admitted constructive total loss, the *Empire Gladstone* had, prior to 10 a.m. on September 7, become a constructive total loss within the definition, admittedly applicable, contained in s. 60 of the Marine Insurance Act, 1906. Nor is it necessary to deal at any length with the letter of September 6 by which the charterers requested insurance brokers to give notice of abandonment to underwriters in stipulated terms. Leaving aside all questions as to whether the charterers had any authority to cause any notice of abandonment to be sent, the letter merely has some evidential value as to what charterers may have thought.

I incline to the view that by the provisions of cl. 8 the parties have defined and limited the circumstances for the cessation of hire. Hire ceases when there is total loss, either actual or constructive; in the latter case there may be ante-dating. Apart, therefore, from total loss, the contract does not provide for the cessation of hire. In my view, hire will continue to be payable during the term of the demise charter unless and until the particular circumstances arise which the parties have decided upon and expressed in order to effect its cessation, that is, the occurrence of total loss, actual or constructive.

I recognize the force of the different view, and if there be an implication that the fulfilment of the commercial purpose of the hiring must continue to be possible—whether the ship is technically an actual or constructive total loss or not—then I share the conclusion, on the facts, that on or prior to September 7 the *Empire Gladstone* was no longer capable of any further use as a cargo-carrying ship. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Richards, Butler & Co.; The Treasury Solicitor.*

C. G. M.

KAHAN *v.* PAKISTAN FEDERATION.

[1951 K. No. 27.]

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Jenkins and
Birkett, L.JJ.

International Law—Status of foreign sovereign State—Immunity—Agreement in contract to submit to jurisdiction of English courts—Foreign State sued on contract—Summons to set aside writ—Submission withdrawn—Withdrawal effective.

The English courts will not implead an independent sovereign State, against its will. Where such a State has made a written contract with a contractor, and, by that contract, the State, in express terms, has agreed to submit, for the purposes of the contract, to the jurisdiction of the English courts (both parties agreeing that the interpretation and effect of the contract shall be construed and governed by English law and that for the purposes of the proceedings the contract shall be deemed to have been made in England and to have been performed in England), when subsequently the contractor alleges breaches of the contract by the independent sovereign State and issues a writ against it, claiming redress, that State can resile from its agreement to submit to the jurisdiction and claim and secure immunity. Although the independent sovereign State has broken its agreement to submit to the jurisdiction, it has not given jurisdiction to the English courts, since the agreement to submit is one made inter partes, and is not an actual submission made by the State, that is, an undertaking given to the court at the time when the other party asks the court to exercise jurisdiction over it.

Mighell v. *Sultan of Johore* [1894] 1 Q. B. 149, and *Duff Development Co. Ld.* v. *Government of Kelantan* [1924] A. C. 797 followed.

Appeal from an order of Slade, J., in chambers.

The plaintiff entered into a contract for the supply of Sherman tanks—armoured fighting vehicles—with the Pakistan Government, whom he sued for breach of contract as to payment, etc., with consequential money claims. There were a number of defendants, including the first defendants, the Federation, originally sued as the Government, of Pakistan. Clause 19 of the contract was alleged to be in these terms: "The interpretation "and effect of this agreement shall be construed and governed by "English law and for the purpose of proceedings this agreement "shall be deemed to have been made in England and to have "been performed there. The Government agrees to submit for "the purposes of this agreement to the jurisdiction of the English "courts. Any legal proceedings and any notices under this "agreement requiring to be served on the vendor or on the "Government respectively shall be deemed properly served, if

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"served on the vendor at the address given at the heading of this "agreement or on the High Commissioner for Pakistan in the "United Kingdom at 35 Lowndes Square, London, S.W.1. The "vendor shall also nominate an authorized representative to "accept service of any notices requiring to be served at the factory "or elsewhere and also to take delivery on behalf of the vendor of "any acceptance or other certificate or document to be delivered "by the commanding officer to the vendor under this agreement". The agreement was signed by the High Commissioner for Pakistan, purporting to do so by order and direction of the Government of Pakistan.

The Pakistan Government entered a conditional appearance to the writ and issued a summons to set it aside so far as it purported to implead the Pakistan Government.

The master made an order which, after providing for the amendment of the proceedings by altering the description of the first defendant from "The Government of Pakistan" to "The "Federation of Pakistan", set the writ aside, in so far as it purported to implead the Federation of Pakistan.

On appeal to him in chambers, Slade, J., sought the advice of the appropriate Secretary of State, namely, the Secretary of State for Commonwealth Relations, in accordance with a practice long recognized in cases in which the status of a defendant, claiming to be a sovereign State, was in question. By his reply on April 3, 1951, the Secretary of State wrote (omitting formal parts): "With reference to your letter of the 9th March, stating "that for the purpose of an interlocutory application in the above "action Mr. Justice Slade desires to have a certificate indicating "whether Pakistan is an independent Sovereign State, I am "directed by the Secretary of State for Commonwealth Relations "to inform you that an independent Dominion of Pakistan was "set up by section 1 of the Indian Independence Act, 1947. "Under the subsequent provisions of that Act, in particular, "sections 5, 6 and 7, and by reason of the Constitutional Conven"tions, which govern the practice in these matters, Pakistan is "a self-governing country within the British Commonwealth of "Nations, Sovereign both in internal and in external affairs, "linked with the United Kingdom, through a common allegiance "to the Crown, but in other respects independent of it. In "the view of the Secretary of State, therefore, Pakistan is an "independent sovereign State".

Slade, J., again following the recognized practice, accepted that advice or certificate as conclusive evidence, for the purpose of the present case, that Pakistan was an independent sovereign State, and it was on that footing that he dismissed the appeal. From that decision the plaintiff appealed.

Lindner for the plaintiff. Unless this appeal is allowed, the whole object of cl. 19 of the contract made between the parties will be defeated. It may be that the certificate of the Secretary of State for Commonwealth Relations that Pakistan is an independent sovereign State is not conclusive and binding, since, as appears from that certificate, the status of the Dominion is determined by the Indian Independence Act, 1947, and that State is within the British Commonwealth of Nations. The duty of allegiance may prevent Pakistan from possessing the status of a foreign independent State. But I am prepared to accede to the view that the certificate of the Secretary of State is conclusive and that for the plaintiff to succeed he must bring his case within some exception to the general rule that an independent sovereign State cannot be impleaded against its will.

[*Diplock, K.C.* (interposing for the Federation). For our part we should prefer to keep open that question. Special considerations may apply to the case of a member of the British Commonwealth of Nations whose rights are derived from a British Act of Parliament, differing from those which apply in the case of a foreign sovereign State.]

[Counsel for both parties agreed that, for the purposes of this appeal, the Federation should be taken to be in the position of a foreign sovereign State so far as the question of immunity was concerned.]

Lindner continuing. First, this was a mere commercial agreement into which a sovereign State has chosen to enter. The State has expressly agreed in the contract that it is to be an English agreement deemed to have been made in England and to be performed in England. Special provision is made for the service of all documents in England, and in express terms the State agrees *for the purposes of this agreement* to submit to the jurisdiction of the English courts. Such a contract, it is submitted, is outside the ordinary doctrine of immunity on the part of a sovereign State. That the parties intended this is clear from the terms of the contract.

There is no generally accepted principle of international law that an independent sovereign State is immune from jurisdiction in respect of commercial transactions and the force of law should not be given to any doctrine of International Law, unless it has the hallmark of general consent and reciprocity: *Compania Naviera Vascongado* v. *S.S. Cristina* (1); *per* Lord Thankerton (2); *per* Lord Macmillan (3), and *per* Lord Wright (4). The doctrine of immunity is a concession to the dignity, equality and independence of sovereign States and should be jealously watched: *Dollfus Mieg et Compagnie S.A.* v. *Bank of England* (5), *per* Evershed, M.R. (6), and Somervell, L.J. (7). It should not be extended having regard to the growth of state trading which is a comparatively modern development.

The cases in which the application of the doctrine of immunity has been illustrated were concerned with public ships destined to public uses and are not analogous to the present case: see *The Charkieh* (8); *The Parlement Belge* (9); and *The Porto Alexandre* (10). The authority of *The Porto Alexandre* was doubted in the *Cristina* case (1), and the immunity conceded in such cases ought not to be conceded in the totally different circumstances of State commercial contracts. It is submitted in general that there is no challenge to the dignity, equality or independence of a sovereign State in being sued in the courts of another such State, in respect of such contracts. In this particular case it would be inconsistent with such dignity, equality and independence for the doctrine to apply. There could here be no such challenge because the Federation having regard to cl. 19 of the agreement in substance and effect have chosen to come to this country and to enter into the contract and to be bound by English law and to submit to the jurisdiction, thus showing that it is to be regarded in the same way as a contract between ordinary individuals for the same purpose. If the plaintiff should sue in the courts of Pakistan, he would be met by the terms of cl. 19 of the contract. There cannot be any suggestion of a challenge to the independence of Pakistan by doing that which that sovereign State has, in advance, agreed should be done, in the circumstances contemplated by the parties.

Secondly, it is submitted that cl. 19 of the contract is a clear unambiguous agreement for valuable consideration consenting to the jurisdiction: it is binding, and it is a waiver of any immunity. The Federation cannot now resile from it. *Mighell* v. *Sultan of*

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(1) [1938] A. C. 485.
(2) Ibid. 494, 496.
(3) Ibid. 497, 498.
(4) Ibid. 500.
(5) [1950] Ch. 333.
(6) Ibid. 347, 349.
(7) Ibid. 359, 361.
(8) (1873) L. R. 4 Ad. & Ecc. 59.
(9) (1879) 4 P. D. 129; (1880) 5 P. D. 197.
(10) [1920] P. 30.

Johore (11) and *Duff Development Co. Ld.* v. *Government of Kelantan* (12) are each distinguishable on their facts. In both those cases the submission to the jurisdiction, contended for, rested on inference. Here there is express agreement formally embodied in a written document. Further, in *Duff's* case (12) the inference of submission to the jurisdiction was sought to be drawn from a submission to arbitration and proceedings consequential to arbitration. A submission to arbitration is an ouster of the jurisdiction of the courts. It is submitted that the passages in the speeches of *Duff's* case (12) to the effect that the submission to the jurisdiction must be before the court itself and cannot take place before proceedings are instituted were obiter. The question in that case and in *Mighell's* case (11) did not resemble any decision on whether or not an express agreement, prior to action brought, to submit constitutes a submission. Here the agreement provides not only for submission to the jurisdiction, but also for the proper law of the contract and the method of effecting service of process. It is submitted that if such an agreement does not constitute a submission to the jurisdiction, no agreement ever can, and no submission to the jurisdiction could be of any value, if it can be resiled from at any time.

Thirdly, if cl. 19 is a valid and effective submission to the jurisdiction process was properly served on the High Commissioner. It is service in accordance with the provisions of cl. 19 of the contract.

Diplock, K.C., and *Lord Hailsham* for the Federation. A claim to, or waiver of, diplomatic immunity is an act of State, so that, on such an issue, there may arise questions of policy, which it may not be desirable to discuss in open court. Any question of the merits must be put on one side. As Lord Esher, M.R., said in *Mighell* v. *Sultan of Johore* (13): "If it is "then shown that he is an independent sovereign, and does not "submit to the jurisdiction, the court has no jurisdiction over "him. It follows from this that there can be no inquiry by the "court into his conduct prior to that date". It has been agreed that, for the purposes of this case, the Federation shall be considered as an independent sovereign State. If it were not, this action must be brought against the Crown as the sovereign of Pakistan; but in that event the action would not lie, because the Crown Proceedings Act, 1947, does not apply to the Crown in its capacity as sovereign of Pakistan.

(11) [1894] 1 Q. B. 149.
(12) [1924] A. C. 797.
(13) [1894] 1 Q. B. 149, 159.

The argument for the plaintiff is based on two grounds. First, it is said that the immunity of an independent sovereign State does not apply in relation to trading contracts. That ground is based on certain observations made in *The Cristina* (14) and of Evershed, M.R., in *Dollfus Mieg et Compagnie S.A.* v. *Bank of England* (15). This ground, it is submitted, is wholly misconceived. An action in personam will not lie against an independent sovereign State, that is, against a State with the status of an independent foreign State, as, it has been agreed, is Pakistan, for the purposes of this case, except with the consent of that State. This rule has been unquestioned for centuries. The statute of Anne (the Diplomatic Privileges Act, 1708 (7 Anne, c. 12)) which embodies it has been said merely to embody the common law. The proposition to the contrary has never been even suggested.

Quite separately, another form of immunity has grown up in the nineteenth century—a comparatively modern rule. That was the rule derived from *The Parlement Belge* (16), which may be stated in two alternative ways: that the property of an independent foreign State is without the jurisdiction of the court and is immune from an action in rem, or, alternatively, that no proceedings may be brought against the property of an independent sovereign State which will have the effect of impleading that State, that is, of forcing that State to take action in the English courts if it desires to protect its property. This rule is with regard to an action in rem and has mostly occurred in the case of ships. The rights involved need not be proprietary rights. There is a field in the periphery of the in rem type in which there may be some doubt as to how far the immunity extends. But there has never been any dispute in this country that no action in personam lies against an independent sovereign State unless such State consents to its being impleaded. Lord Atkin, in *Compania Naviera Vascongado* v. *S.S. Cristina* (17), said: "The foundation for the application to "set aside the writ and arrest of the ship is to be found in two "propositions of international law engrafted into our domestic "law which seems to me to be well established and to be beyond "dispute. The first is that the courts of a country will not "implead a foreign sovereign, that is, they will not by their "process make him against his will a party to legal proceedings, "whether the proceedings involve process against his person or

(14) [1938] A. C. 485.
(15) [1950] Ch. 333.
(16) 4 P. D. 129; 5 P. D. 197.
(17) [1938] A. C. 485, 490.

"seek to recover from him specific property or damages. The "second is that they will not by their process, whether the "sovereign is a party to the proceedings or not, seize or detain "property which is his or of which he is in possession or control. "There has been some difference in the practice of nations as to "possible limitations of this second principle as to whether it "extends to property only used for the commercial purposes of "the sovereign or to personal private property. In this country "it is, in my opinion, well settled that it applies to both".

Pakistan therefore cannot be impleaded here without its consent. And that consent must be an actual submission to the jurisdiction in the face of the court and addressed to the court. The submission must be made when the court is about or is being asked to exercise jurisdiction over him and not at any previous time: see *Mighell* v. *Sultan of Johore* (18), and more especially the judgment of Lord Esher, M.R. (19), in that case. The submission cannot be made at some previous time by an agreement with the other party to the proposed litigation. It must be made to the court and according to Kay, L.J., when, "upon being "sued, he actively elects to waive his privilege and to submit "to the jurisdiction" (20). See also the decision in *Duff Development Co. Ld.* v. *Government of Kelantan* (21), from which it appears that to waive immunity the independent sovereign State must submit to the court itself, and nothing short of that will suffice.

Lindner replied.

JENKINS, L.J. Two questions arose for decision before the master and the judge in chambers. The first concerned the status of the Federation of Pakistan, and as to that, the matter was, I understand, put in two ways before the master. First, it was said that the Federation of Pakistan, though within the British Commonwealth, had the status of an independent sovereign State and thus was in the same position for the purposes of suit in this country as any foreign sovereign would be. Alternatively, it was said that if the Federation of Pakistan was not in that sense an independent sovereign State, the action must then be regarded as an action against the Crown in its capacity as sovereign of Pakistan, and it was claimed that in that alternative also the plaintiff's action would not lie, because

(18) [1894] 1 Q. B. 149.
(19) Ibid. 159.
(20) Ibid. 164.
(21) [1924] A. C. 797.

the Crown Proceedings Act, 1947, which enables the Crown to be sued by writ, would not apply to the Crown in its capacity as sovereign of Pakistan.

When the matter came before us, Mr. Lindner, for the plaintiff, began by accepting the view that the certificate was conclusive and that, in order to succeed, he must bring his case within some exception to the general rule as to the immunity of independent sovereign States from suit in this country. Mr. Diplock, for the Pakistan Government, then intervened and intimated that for his part he wished to keep open that question. He said that special considerations might apply to the case of a member of the British Commonwealth of Nations whose rights stemmed from an Act of the Imperial Parliament differing from those which applied in the ordinary case of a foreign sovereign State in the strict sense of the expression. Thereupon, Mr. Lindner made certain formal submissions on that matter, but he did not press the argument, as indeed he foresaw that his position would not be improved by successfully pursuing it. No convincing reasons were adduced before us why such a certificate should not be just as conclusive in the present case as it would be in the case of a foreign sovereign State; but the matter was not fully argued and it is not necessary for the purposes of the present appeal to express any concluded opinion upon it, for ultimately both parties agreed that for the purposes of this appeal the Federation of Pakistan could be taken to be in the position of a foreign sovereign State so far as the question of immunity is concerned. Mr. Diplock, however, reserved the right, should this matter fall to be dealt with elsewhere, to make the alternative submission he had adumbrated as to the status of the Federation of Pakistan. That disposes of the first question.

The second question is this: the status of the Federation of Pakistan being for this purpose, ex concessis, equivalent to that of a foreign sovereign State, is that Government, in the circumstances of this case, amenable to the proceedings brought against it; that is to say, are the present proceedings properly brought against the Federation of Pakistan, being for this purpose equivalent to a foreign sovereign State?

The general rule is well settled, and it is unnecessary for me to do more than refer to the statement of it given in the speech of Lord Atkin in the case of *Compania Naviera Vascongado* v. *S.S. Cristina* (22), where he said: "The foundation for the

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(22) [1938] A. C. 485, 490.

" application to set aside the writ and arrest of the ship is to be " found in two propositions of international law engrafted into " our domestic law which seem to me to be well established and " to be beyond dispute. The first is that the courts of a country " will not implead a foreign sovereign, that is, they will not by " their process make him against his will a party to legal proceedings whether the proceedings involve process against his " person or seek to recover from him specific property or damages. " The second is that they will not by their process, whether the " sovereign is a party to the proceedings or not, seize or detain " property which is his or of which he is in possession or control. " There has been some difference in the practice of nations as to " possible limitations of this second principle as to whether it " extends to property only used for the commercial purposes of " the sovereign or to personal private property. In this country " it is in my opinion well settled that it applies to both ".

Prima facie, the present case comes within the first of those two propositions. This is a plain case of bringing an action against an independent sovereign State and thereby directly impleading that sovereign. Prima facie, therefore, it is an action which, quoad the sovereign concerned, the courts of this country have no jurisdiction to entertain, and it is therefore a case in which the writ was rightly set aside as against the sovereign thus sought to be impleaded.

Mr. Lindner claims that the present case comes outside that general rule. To appreciate his argument, it is necessary to look at cl. 19 of the contract sued upon. [His Lordship read cl. 19 in full.]

Mr. Lindner uses cl. 19 in two ways. First, he uses it in support of an argument of this nature: this is a case in which a foreign sovereign has chosen to come to this country and enter into an ordinary commercial agreement with a clause in the terms of cl. 19, showing that it is to be regarded in no different light from a contract between ordinary individuals for similar purposes. He invites us to hold that a transaction of that kind is, on general principles, outside the ordinary doctrine of immunity. That is an argument which, with all respect to Mr. Lindner, I find it quite impossible to accept. As I have already mentioned, this is a plain case of direct impleading coming within the first of the two propositions stated by Lord Atkin in the *Cristina* case (22). So far as Lord Atkin's second proposition is concerned, embracing as it does cases of proceedings affecting the property as distinct from the person of a sovereign and cases in which, while there is no direct impleading of the sovereign, it may be said that he has been indirectly impleaded in that his title to or possession of property is placed in jeopardy, it is no doubt true that there are various judicial pronouncements expressing doubt as to the precise limits which should be placed upon it, but, so far as I know, no qualification of the first proposition has ever been suggested. A foreign sovereign cannot be directly impleaded unless he submits to the jurisdiction of the court.

There remains the second branch of Mr. Lindner's argument, which is to the effect that cl. 19 of the contract is, for this purpose, a submission to the jurisdiction of the court which precluded the Federation of Pakistan from thereafter objecting to the jurisdiction in any proceeding which might ensue upon the contract. There is no doubt that cl. 19 does contain an express and unambiguous agreement on the part of the Government—that is the Federation—of Pakistan to submit, for the purposes of the agreement, to the jurisdiction of the English courts. Regarding the matter as if it were free from authority, there is therefore a considerable attraction in Mr. Lindner's argument, for it may be said with force: What reason is there why a party to an agreement, whether a foreign Government or any other person not ordinarily amenable to the jurisdiction of the English courts, should, after solemnly and expressly agreeing to submit to the jurisdiction of those courts for the purposes of a particular agreement, be allowed to resile from that bargain made in perfectly clear terms? But the matter is not free from authority, and I think it is established beyond question by authorities binding on this court that a mere agreement by a foreign sovereign to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to resile from it. Nothing short of an actual submission to the jurisdiction—a submission, as it has been termed, in the face of the court—will suffice.

The authorities which establish that proposition, so far as I need refer to them, are two. The first is the case of *Mighell* v. *Sultan of Johore* (23). The facts of the case were very different from those in the present case. It was a case of a foreign sovereign residing in this country under an assumed name as if he was a private individual, and it was argued that, by so conducting himself, he had inferentially submitted to the jurisdiction of the English courts for the purposes of the contract sued upon. It was held that he had not done so on the facts of the case, but in so holding the members of the court made certain observations which are most relevant here.

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(23) [1894] 1 Q. B. 149.

Lord Esher, M.R., said (24): "We had not then to deal with "the question of a foreign sovereign submitting to the jurisdic- "tion; everybody knows and understands that a foreign sovereign "may do that. But the question is, how? What is the time at "which he can be said to elect whether he will submit to the "jurisdiction? Obviously, as it appears to me, it is when the "court is about or is being asked to exercise jurisdiction over "him, and not any previous time. Although up to that time he "has perfectly concealed the fact that he is a sovereign, and "has acted as a private individual, yet it is only when the time "comes that the court is asked to exercise jurisdiction over him "that he can elect whether he will submit to the jurisdiction. "If it is then shown that he is an independent sovereign, and "does not submit to the jurisdiction, the court has no jurisdiction "over him. It follows from this that there can be no inquiry by "the court into his conduct prior to that date".

Lopes, L.J., said (25): "But there is no doubt that a foreign "sovereign may submit to the jurisdiction of the courts of this "country, and it was contended that in this particular case he "had so submitted, because he had taken an assumed name and "acted as a private individual. We are asked from that to infer "the fact of submission to the jurisdiction. I am of opinion that "no such inference can be drawn. In my judgment, the only "mode in which a sovereign can submit to the jurisdiction is "by a submission in the face of the court, as, for example, by "appearance to a writ"; and Kay, L.J., said (26): "I should "put it thus: the foreign sovereign is entitled to immunity from "civil proceedings in the courts of any other country, unless, "upon being sued, he actively elects to waive his privilege and "to submit to the jurisdiction. Here the defendant has not done "that, but just the contrary".

Mr. Lindner argued with force that, though the observations I have quoted are at first sight against him, no great weight should be attached to them, because the circumstances of the case there under consideration were so entirely different from those in the present case. In *Mighell* v. *Sultan of Johore* (24) the court was concerned with an argument that submission was to be inferred from the fact that the foreign sovereign had chosen to live here under an assumed name as a private individual, whereas the submission here relied on is an express formal submission in clear terms contained in a contract. There is great force, to my mind, in those observations; but the matter does not rest there, for it was later considered by the House of Lords in the well-known case of *Duff Development Co. Ld.* v. *Government of Kelantan* (27). That was the case in which there was a contract with the Government of Kelantan containing an arbitration clause incorporating the Arbitration Act, 1889, so far as applicable. Disputes having arisen under the deed, they were referred to an arbitrator, who made an award in favour of the company and directed the Government of Kelantan to pay the costs. The Government later applied to the Chancery Division, under s. 11 of the Arbitration Act, to set aside the award, but the application was refused. Thereafter, the company obtained from the King's Bench Division, under s. 12 of the Act, an order giving leave to enforce the award, but this order was set aside, on the application of the Government, on the ground that Kelantan was an independent sovereign State.

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(24) [1894] 1 Q. B. 149, 159.
(25) Ibid. 160.
(26) Ibid. 163.

The question was thus raised in an acute form whether the Government of Kelantan had or had not submitted to the jurisdiction of the court. That aspect of the case was thus dealt with by Lord Cave (28): "But secondly it is argued on behalf of the "appellant company that, assuming the Sultan of Kelantan to "be a sovereign ruler, he has waived his sovereignty and sub-"mitted to the jurisdiction of the High Court—and that in two "ways—namely, first by assenting to the arbitration clause in "the deed of 1912, and secondly by applying to the court to set "aside the award of the arbitrator. Then has the respondent by "agreeing to the arbitration clause in the deed of 1912 submitted "to the jurisdiction so far as regards an application to the court "to enforce the award? The arbitration clause provides that "'this shall be deemed a submission to arbitration within the "'Arbitration Act, 1889, or any statutory modification or re-"'enactment thereof for the time being in force, the provisions "'whereof shall apply so far as applicable'. I think the effect "of this provision is to incorporate in the deed the relevant "provisions of the Arbitration Act, including the power given by "the Act to either party on having an award made in his favour

(27) [1924] A. C. 797.

(28) Ibid. 809.

"to make an application to the court under s. 12 of the Act for "leave to enforce the award, and the words 'so far as applicable' "do not appear to me to qualify that right. If so, then the "Sultan has in effect agreed to submit to the jurisdiction so far "as to entitle the appellants to apply to the court for leave to "enforce an award against him and on leave being given to "enforce it by the usual modes of execution; but the question "remains whether this agreement to submit is equivalent to an "actual submission.

"On full consideration I am not satisfied that it is. I do "not forget the cases in which it has been held that a person "not otherwise liable to the jurisdiction of a court may make it "a term of a contract that questions arising under it shall be "decided by that court, or those cases (such as *Montgomery* v. "*Liebenthal* (29)) in which it has been held that a person out-"side the jurisdiction may agree that service of process upon a "person within the jurisdiction shall be good service upon him-"self. But in the case of a foreign sovereign something more "than this is required. It was held in *Mighell* v. *Sultan of* "*Johore* (30) that a submission by such a sovereign, to be "effective, must take place when the jurisdiction is invoked and "not earlier, and that when a question of jurisdiction is raised "by him there can be no inquiry by the court into his conduct "or actions prior to that date; and I see no reason for doubting "the correctness of that decision. If, therefore, a sovereign "having agreed to submit to jurisdiction refuses to do so when "the question arises, he may indeed be guilty of a breach of his "agreement, but he does not thereby give actual jurisdiction to "the court".

Lord Dunedin said on the same point (31): "An arbitrator is "not a court, and therefore by appearing before the arbitrator he "did not submit himself to the jurisdiction of the courts. (It "may be interesting to note that, under the Roman law, appear-"ance before an arbiter did not give rise to reconvention: see a "very learned judgment of Inglis, L.J.-C., in *Thompson* v. "*Whitehead* (32).) True it is that the Sultan contracted to "allow the jurisdiction to be exercised against him, but he did "so out of court, and now he has changed his mind. He has "broken his contract, but the court has no jurisdiction to enforce "any performance of it. It seems to me to say that by agreeing "to submit he did submit is to argue in a circle".

(29) [1898] 1 Q. B. 487.
(30) [1894] 1 Q. B. 149.
(31) [1924] A. C. 797, 821.
(32) (1862) 24 Dunlop 331.

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Lord Sumner said (33): "The Sultan's contract to arbitrate "in accordance with the Arbitration Act is not, either in itself "or in combination with anything else in this case, a submission "to the jurisdiction of the High Court. It is not an undertaking "given to the court itself. It is an agreement inter partes, and "no more. An agreement inter partes that the court shall be "enabled to do something, which by law it cannot do, is of no "avail, whether it is by statutory rules that the court is thus "incompetent (*British Wagon Co. Ld.* v. *Gray* (34)), or by a "general rule of the common law, like that which gives or creates "a foreign sovereign's immunity. Ordinary persons can contract "themselves out of the formalities, which the orders and rules "prescribe for proceedings, which the court has power to take: "*Montgomery* v. *Liebenthal* (35). So, too, acting under statutory authority, the High Court allows service of its writ, or of "notice of its writ, as the case may be, on parties outside the "jurisdiction, who, if within it, would have been personally "amenable. Sovereigns, however, are not amenable at all, "except by their own consent, and there is no principle upon "which such consent can be deemed to have been given short of "action taken towards the court itself, such as is commonly "called a submission to the jurisdiction. It is, therefore, "necessary to find something voluntarily done by the foreign "sovereign in or towards the court and to find in what is done "something that really evinces an intention to submit. This "seems to me to be beyond the limits of presumption or fiction, "for the foundation of the jurisdiction is not any rule of "municipal law, but the action of an independent personage, "who himself is beyond its reach".

It will thus be seen that three out of the five learned Lords who heard *Duff Development Co. Ld.* v. *Government of Kelantan* (36) expressed, in the clearest possible terms, the view that no mere agreement inter partes to the effect that a foreign sovereign should submit to the jurisdiction of the court can suffice to give the court jurisdiction, in the event of the foreign sovereign choosing to resile from it. Actual submission before the court itself, and nothing short of that, is required. It follows that, on the basis on which we have been asked to deal with this appeal, namely, on the basis that the Federation of Pakistan is to be regarded for this purpose as equivalent to a foreign sovereign State enjoying the recognized immunities accorded to such a State, I am of opinion that the appeal must fail. The action involved a direct impleading of a foreign sovereign, and there was no submission to the jurisdiction, because it is plain on the authorities that a mere agreement by a foreign sovereign, such as that contained in cl. 19 of the contract here sued upon, to submit to the jurisdiction of the English courts, does not suffice to give those courts jurisdiction.

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(33) [1924] A. C. 797, 829.
(34) [1896] 1 Q. B. 35.
(35) [1898] 1 Q. B. 487.
(36) [1924] A. C. 797.

Another point was raised on the efficacy of the mode of service adopted. In the view I take of the other questions in the case, that question does not arise, but I understand Slade, J., to have held—and Mr. Diplock is not disposed to differ from him in this—that on the assumption that cl. 19 was a valid clause, having the effect of making the Federation of Pakistan amenable to the jurisdiction of the English courts, then the service of the writ effected in the way described in the evidence, into the details of which I need not enter, was service in accordance with the terms of that clause and therefore to be considered as sufficient. As to this, I need only say that inasmuch as, on the grounds I have stated, cl. 19 is to be regarded as wholly ineffective for the purpose of giving the English courts jurisdiction, I find it unnecessary to decide whether the mode of service adopted would have been adequate if the contrary had been the case.

For these reasons, I am of opinion that in this case, which turns entirely upon the authorities, and in which we have not been concerned at all with the merits, one way or the other, of the dispute sought to be litigated, the master and the judge came to a right conclusion, and accordingly that the appeal should be dismissed.

BIRKETT, L.J. I agree with the judgment just delivered. Although there is strictly nothing that I need add, I should like to say a word or two about the principal point which seems to me to govern the decision. I would like to re-emphasize what my Lord has said, namely, that we have not been concerned in the smallest degree with the merits of this matter. There were times when Mr. Lindner seemed to me to be getting a little impassioned. It is right, therefore, that I should say that we have not been informed and we have not considered and we do not discuss any merits on the one side or the other. The case is, I think, as my Lord has said, purely to be decided as a matter of law, and in the result the case of *Duff Development Co. Ld.* v. *Government of Kelantan* (37) is conclusive of almost every point.

The history of the matter has been carefully recited by my Lord, and therefore I add nothing to that, but *Duff Development Co. Ld.* v. *Government of Kelantan* (37), on the first point which was taken here, seemed to me also to be really instructive. Viscount Cave said (38): "First, it was argued that the Govern-"ment of Kelantan", which was in fact an independent State in the Malay Peninsula, "was not an independent sovereign "State, so as to be entitled by international law to the immunity "against legal process which was defined in *The Parlement* "*Belge* (39). It has for some time been the practice of our "courts, when such a question is raised, to take judicial notice "of the sovereignty of a State, and for that purpose (in any case "of uncertainty) to seek information from a Secretary of State; "and when information is so obtained the court does not permit "it to be questioned by the parties. Information of this character "was obtained from a Secretary of State and accepted without "question in *Taylor* v. *Barclay* (40) and *Mighell* v. *Sultan of* "*Johore* (41); and those cases were followed in *Foster* v. *Globe* "*Venture Syndicate* (42) and in *The Gagara* (43). In the present "case the requisite inquiry was addressed by Master Jelf (while "the summons to enforce the award was pending before him) to "the Secretary of State for the Colonies, and in answer to this "inquiry the Under-Secretary replied", and it is there set out. Viscount Cave continued (44): "In the present case the reply of "the Secretary of State shows clearly that notwithstanding the "engagements entered into by the Sultan of Kelantan with the "British Government that Government continues to recognize "the Sultan as a sovereign and independent ruler, and that His "Majesty does not exercise or claim any rights of sovereignty or "jurisdiction over that country. If, after this definite statement, "a different view were taken by a British court, an undesirable "conflict might arise; and, in my opinion, it is the duty of the "court to accept the statement of the Secretary of State thus "clearly and positively made as conclusive upon the point". I have cited that merely as a matter of interest, because in the result Mr. Lindner came back to the position from which he started, by saying that he did not seek to go behind that certificate.

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(37) [1924] A. C. 797.
(38) Ibid. 805.
(39) 4 P. D. 129; 5 P. D. 197.
(40) (1828) 2 Sim. 213.
(41) [1894] 1 Q. B. 149.
(42) [1900] 1 Ch. 811.
(43) [1919] P. 95.
(44) [1924] A. C. 808.

I also agree that the procedure in this case falls within the first proposition of international law engrafted into our domestic law laid down by Lord Atkin in *The Cristina* (45): "The courts "of a country will not implead a foreign sovereign, that is, they "will not by their process make him against his will a party "to legal proceedings whether the proceedings involve process "against his person or seek to recover from him specific property "or damages".

But I confess that I was exercised about the argument put forward by Mr. Lindner about cl. 19, because, if the language of cl. 19 is looked at, nothing could really be plainer. It says: "The Government agrees to submit for the purposes of this "agreement to the jurisdiction of the English courts", and then it goes on to deal with procedural matters, but nothing, of course, could be plainer than that, in this contract between the plaintiff and the Federation of Pakistan, it was a term of the agreement that the Government would submit, for the purposes of this agreement, to the jurisdiction of the English courts. No doubt, when the contract was being prepared, that aspect of the matter received, as it deserved to have received, the most careful consideration: "Should there be a breach of contract, or a dispute, "what are we to do?" Clause 19 appears to give the answer: "The Government will submit to the jurisdiction". There is, indeed, immense force in what Mr. Lindner has said, to use his words, that this was an agreement for valuable consideration agreeing to the jurisdiction: it is binding and it is a waiver.

It is important to remember that *Mighell* v. *Sultan of Johore* (46) and *Duff Development Co. Ld.* v. *Government of Kelantan* (47) concern this very matter, and of these perhaps the second is the more impressive. It is quite frankly stated in *Mighell* v. *Sultan of Johore* (46) that that case was brought by way of appeal against the proposition that the certificate of a Secretary of State should be binding; but it is a very odd case in some respects, because, there, the only matter that was alleged was that this foreign potentate had come to this country in 1885 and, according to the affidavit of the plaintiff, had lived under the name of Albert Baker and had promised the plaintiff, as alleged, marriage in the name of Albert Baker. Then, the plaintiff having discovered that he was really the Sultan of Johore, she promised to keep the matter secret. Then he left this country and came back in 1893, still under the name of Albert Baker, and what was said in that case was: “That was your waiver of your “immunity. That was your implicit submission to the jurisdiction”; but whether those facts ever could or did amount to any such thing became really immaterial, because, as Lord Esher, M.R., having dealt with *The Parlement Belge* (48), said (49): “We had not then to deal with the question of a foreign sovereign “submitting to the jurisdiction; everybody knows and under“stands that a foreign sovereign may do that. But the question “is, How? What is the time at which he can be said to elect “whether he will submit to the jurisdiction? Obviously, as it “appears to me, it is when the court is about or is being asked “to exercise jurisdiction over him, and not any previous time”.

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(45) [1938] A. C. 485, 490.
(46) [1894] 1 Q. B. 149.
(47) [1924] A. C. 797.

My Lord has already quoted the passage from the judgment of Lopes, L.J., and that from the judgment of Kay, L.J. So, on the facts of that case, which are very dissimilar, of course, from the facts here, nevertheless a principle of law was enunciated as to the manner in which an effective submission to the jurisdiction may be made. But *Duff Development Co. Ld.* v. *Government of Kelantan* (50) in the House of Lords seems to me to be an overwhelming authority against the submission of Mr. Lindner, because the very words used by the Law Lords apply with absolute strictness to this case. Take this passage in the speech of Viscount Cave (51): “If therefore a sovereign “having agreed to submit to jurisdiction” (that is this case, according to Mr. Lindner; cl. 19 says in the plainest terms, “I submit to the jurisdiction”) “refuses to do so when the “question arises” (that is exactly this case) “he may indeed be “guilty of a breach of his agreement, but he does not thereby “give actual jurisdiction to the court”. The words might have been framed for this very case.

Similarly, the words of Lord Dunedin (52): “True it is that “the Sultan contracted to allow the jurisdiction to be exercised “against him” (that is this case) “but he did so out of court” (this case) “and now has changed his mind” (this case). “He “has broken his contract, but the court has no jurisdiction to “enforce any performance of it”. Then there was the other confirming passage in the speech of Lord Sumner which, as I say, might have been prepared with the facts of this case in mind.

(48) 4 P. D. 129; 5 P. D. 197.
(49) [1894] 1 Q. B. 159.
(50) [1924] A. C. 797.
(51) Ibid. 810.
(52) Ibid. 821.

For these reasons and the reasons adduced by my Lord, with which I fully agree, I think that notwithstanding the terms of cl. 19, by which the Government of Pakistan wrote: "We agree "to submit for the purposes of this agreement to the jurisdiction "of the English courts", yet on the authority of *Mighell* v. *Sultan of Johore* (53), decided in the Court of Appeal, and still more so of *Duff Development Co. Ld.* v. *Government of Kelantan* (54), decided in the House of Lords, which comes so near to that case, the submissions of Mr. Lindner must fail, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *G. L. Barnett & Co.; Sanderson, Lee & Co.*

C. G. M.

(53) [1894] 1 Q. B. 149.
(54) [1924] A. C. 797.

COX *v.* STINTON.

1951
June 21.

Lord Goddard, C.J., Hilbery and Devlin, JJ.

Criminal Law—Obscene publications—Summons issued ten months after special warrant—Order for destruction—Limitation of time—Sale of obscene photographs—Negatives not offered for sale—"Otherwise "published"—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11—*Obscene Publications Act,* 1857 (20 *&* 21 *Vict. c.* 83), *s.* 1.

On September 23, 1949, a police inspector made a complaint on oath to justices under the Obscene Publications Act, 1857, stating that he had reason to believe and did believe that the defendant kept on his premises for the purpose of distribution certain obscene representations, and that certain articles which were then produced to the justices had been distributed from the defendant's premises to two firms. The justices issued their special warrant by virtue of which the inspector on September 24, 1949, entered the defendant's premises and took possession of a large number of photographs and glass negatives. On July 5, 1950, the inspector made a further complaint to the justices, who issued a summons calling on the defendant to show cause why the photographs and negative plates should not be destroyed. At the hearing the defendant contended that as the summons was not issued within six months of the time when the matter of complaint arose as required by s. 11 of the Summary Jurisdiction Act, 1848, the proceedings were out of time, and that in any case the justices had no authority to order the destruction of the glass negatives since no distribution of them or intent to distribute them had been proved. The justices ordered the destruction of a large number of the photographs and negatives.

On the defendant's appeal to the Divisional Court:—

Held, (1.) that s. 11 of the Summary Jurisdiction Act, 1848, had no application to proceedings under s. 1 of the Obscene Publications Act, 1857, which was an Act containing its own procedure, and that there was no limitation of time within which the summons under the Act of 1857 must be issued. *Quære,* whether if justices before whom articles are brought consider that there has been an unexplained or unreasonable delay in bringing the articles before them, they would be obliged to issue a summons.

(2.) That the glass negatives were representations which were "otherwise published" within the meaning of s. 1 of the Act of 1857 when the positives which were taken from them were published, and that an order for their destruction could therefore properly be made.

Case stated by Middlesex justices.

On September 23, 1949, the prosecutor, Thomas Owen Stinton, a chief inspector of metropolitan police, made a complaint on oath under the Obscene Publications Act, 1857 (1), to Middlesex justices against the defendant, George Harry Cox, who was a technical and artists' photographer. The prosecutor stated that he had reason to believe and did believe that divers obscene representations were kept in certain premises occupied by the defendant at 4 Cleveland Road, Uxbridge, for the purpose of distribution. He produced sixteen articles before the justices and said that they had been distributed to two firms from the defendant's premises during 1948 and 1949. The justices, being satisfied that those articles were of such a character and description that their publication would be a misdemeanor, issued a special warrant authorizing the prosecutor to search the defendant's premises and to seize all the obscene representations on them and bring them before the justices.

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(1) Obscene Publications Act, 1857, s. 1: "It shall be lawful for any "metropolitan police magistrate or "other stipendiary magistrate, or for "any two justices of the peace, upon "complaint made before him or them "upon oath that the complainant has "reason to believe, and does believe, "that any obscene books, papers, "writings, prints, pictures, drawings, "or other representations are kept in "any house . . . or other place within "the limits of the jurisdiction of any "such magistrate or justices, for the "purpose of sale or distribution, "exhibition for purposes of gain, "lending upon hire, or being other-"wise published for purposes of gain, "which complainant shall also state "upon oath that one or more articles "of the like character have been sold, "distributed, exhibited, lent, or other-"wise published as aforesaid, at or in "connexion with such place, so as to "satisfy such magistrate or justices "that the belief of the said complain-"ant is well founded, and upon such "magistrate or justices being also "satisfied that any of such articles so "kept for any of the purposes afore-"said are of such a character and "description that the publication of "them would be a misdemeanour ". . . to give authority by special "warrant to any constable or police "officer to go into such house . . . "or other place, with such assistance "as may be necessary, to enter in "the daytime, and, if necessary, to "use force . . . and to search for "and seize all such books, papers, "writings, prints, pictures, drawings, "or other representations as afore-"said found in such house . . . or "other place, and to carry all the "articles so seized before the magis-"trate or justices . . .; and such "magistrate or justices shall there-"upon issue a summons calling upon "the occupier of the house or other "place which may have been so "entered by virtue of the said war-"rant to appear within seven days "before such police stipendiary magis-"trate or any two justices in petty "sessions for the district, to show "cause why the articles so seized "should not be destroyed".

On September 24, 1949, the prosecutor in pursuance of the warrant entered the premises, inspected a number of photographs and took possession of 455 of them. The defendant showed him a room which was full of boxes containing half-plate glass negatives, and they agreed that all the negatives and photographs found on the premises, except the 455 in the possession of the prosecutor, should remain there until arrangements could be made for their removal. The prosecutor returned on February 22, 1950, and took away the remaining photographs and negatives amounting to about 5,900 glass negatives and 3,834 photographs; and later returned to the defendant 1,100 negatives which appeared to be of a harmless character.

On July 5, 1950, the prosecutor made a further complaint to the justices against the defendant, stating that the prosecutor had entered the premises by virtue of the special warrant on September 24, 1949, and February 22, 1950, and had seized certain obscene photographs and negatives kept for the purpose of sale and gain; and a summons was issued calling on the defendant to show cause why the photographs and negatives in question should not be destroyed.

At the hearing of the complaint on August 1 and September 29, 1950, it was contended for the defendant (1.) that the warrant had been executed on September 24, 1949, and that the seizure of all the photographs and negatives, even those left in the physical custody of the defendant, must be regarded as having been effected on that day; and that, accordingly, the time prescribed by s. 11 of the Summary Jurisdiction Act, 1848 (2), began to run on September 24, 1949, and the summons which was issued on July 5, 1950, was issued out of time; and (2.) that the negatives were incapable of being made the subject of a destruction order since there was never any intention of selling or distributing a negative and no evidence that a negative had been distributed; and (3.) that the photographs were not in law obscene.

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(2) Summary Jurisdiction Act, 1848, s. 11: ". . . in all cases where no "time is already or shall hereafter "be specially limited for making any "such complaint or laying any such "information in the Act or Acts of "Parliament relating to each particu-"lar case, such complaint shall be "made and such information shall be "laid within six calendar months "from the time when the matter of "such complaint or information "respectively arose".

It was contended for the prosecutor that all the photographs and negatives must be regarded as one matter, and that, as they had not been seized in their entirety until February 22, 1950, the summons on July 5, 1950, was in fact issued within the time prescribed by s. 11 of the Summary Jurisdiction Act, 1848; and that a negative was a matter properly within the ambit of s. 1 of the Obscene Publications Act, 1857, in that it was a "representation" which, if photographs printed from it were sold, was "otherwise published" for the purpose of gain.

On January 29, 1950, the justices ordered the destruction of 1,170 photographs and 3,569 negatives. They were of the opinion (1.) that s. 11 of the Summary Jurisdiction Act, 1848, must be construed in relation to the date when the warrant was executed, namely, September 24, 1949, and that by virtue of the agreement which the prosecutor and the defendant had made, the prosecutor was in constructive possession of all the articles in question which remained on the defendant's premises after September 24, 1949; that the matter of complaint arose not when the photographs and negatives were seized, either actually or constructively, but when a time had elapsed after such seizure which was a reasonable one to allow for the examination of each photograph and negative; and that as the period from September, 1949, to January 6, 1950, was a reasonable one for this purpose in the circumstances of the case, the summons was issued in time; and (2.) that the negatives were representations "otherwise published" within the meaning of s. 1 of the Act of 1857, and so were within the ambit of the section. The defendant appealed.

W. D. Collard for the defendant.
M. J. H. Turner for the prosecutor.

Lord Goddard, C.J. [after stating the facts]:—The first point which has been taken against the prosecutor is that the proceedings were out of time in that they should have been started within six months of the time when the matters of the complaint or information respectively arose.

In my opinion there is no time limitation imposed here at all. The Summary Jurisdiction Act, 1848, was intended to codify and regularize summary jurisdiction which, up to that time, had for many years been conferred by various Acts of Parliament, none of them setting out any rules of procedure, and did impose a time limit within which proceedings under that Act must be taken.

[His Lordship read s. 11 of the Act of 1848 and continued:] In my opinion the Obscene Publications Act, 1857, contains its own procedure: it is a complete code in itself. It is different from any other class of proceeding that comes before justices because, although justices make an order for destruction—and, indeed, the only other case where they can make an order for destruction is that of instruments for gaming, which arises under another Act—no offence is created by this Act. This Act was intended not as an instrument of punishment but as preventive legislation. It was meant to give the authorities the power of seizing obscene publications before they were distributed. If they were distributed the person distributing them no doubt would be liable to be indicted for a common law nuisance. Section 1 of the Act of 1857 seems to me to make the matter clear. [His Lordship read s. 1 and continued:] The proceedings are initiated by applying for a search warrant or, as it is called in the Act, a special warrant. That special warrant has to be applied for by means of a complaint, and that this is a special procedure is indicated by the fact that although, in the ordinary way, a complaint is not made on oath, the Act requires it to be made on oath. When that warrant has been granted the police may go to the premises and seize what they find and they must bring what they do seize before the justices, who are then required to issue their summons: the Act does not require them to hear a complaint. When the warrant has been granted, all that has to be done is that the goods should be brought before the justices, and I have no doubt that if the justices thought that there had been an abuse by the police and what had been seized were not in any sense obscene they would not issue a summons; but the Act requires that if obscene articles are brought before the justices the justices shall issue a summons.

It seems clear that s. 11 of the Summary Jurisdiction Act does not apply and no limitation can be pleaded. It cannot be alleged that the proceedings are out of time unless there is some statutory provision which imposes a limitation, and there is no statutory provision imposing any limitation here. Perhaps if justices thought, when the goods were brought before them, that there had been such an unexplained or unreasonable delay that it might be prejudicial to the defendant, they might be entitled to refuse in their discretion to issue a summons; but here the justices have found that there has not been any unreasonable delay.

The other point which was raised would, if we had to give effect to it, largely nullify this Act, because the object of the Act is to prevent the dissemination of this filth. It is said that while the police could seize and the justices could order the destruction of the photographs—using the expression as meaning the positives —they could not order the destruction of the negatives. I would be very sorry to have to give effect to that contention, because if that were so it would leave the defendant in possession of his means of reproducing all these filthy photographs again, and it would simply mean that there would have to be search after search of his house.

In my opinion, however, there is no ground for that argument. The negative is one of those things which, though it may not be sold or distributed or lent, is "otherwise published" when the picture that is taken from it is published: publication of the positive is publication of the negative. The negative has the representation, and you publish the negative by distributing positives; that seems to me to be only a matter of common sense. If a photograph of a public event is taken which it is desired to publish in the newspaper, what it is desired to publish is the photograph that is taken, and the positive and negative only differ in the sense that what is dark on one is light on the other.

In my opinion there is no ground for saying that these negatives were not matter that was "otherwise published". They are themselves pictures and are pictures that are kept for the purpose of being published, as the justices have found, for sale or gain.

For these reasons, in my opinion, both points fail, and the appeal is dismissed with costs.

Hilbery, J. I am of the same opinion.

Devlin, J. I agree. I wish only to add that the reasons which my Lord has given on the first point, with which I agree, are not the reasons given by the justices. I think they misconceived the point which they had to determine. They thought it was necessary under s. 1 of the Act of 1857 that before the summons to show cause was issued there should be a complaint, and they addressed themselves to the question on the assumption that s. 11 of the Summary Jurisdiction Act, 1848, applied to the question whether the complaint was within time or not. For the reasons which my Lord has given there is no necessity for a complaint or for a further complaint before the summons to show cause is issued.

Counsel for the defendant put the point very well when he argued that it was implicit in the word "summons" that a complaint must immediately precede it. I do not think that that construction can be put on this section. I should not like it to be thought, however, that it is open to the police or other authorities to take any amount of time they want over this type of procedure merely because the statutory time limit does not apply. The warrant was issued on September 24 and the summons to show cause was not issued until July 5. That interval of time has, to some extent, been explained by the case. But the statute does, I think, contemplate that the acts which are set out in the section shall follow one another within a reasonable time; and in particular the duty to carry all the articles so seized before the justices does not mean that that can be done with any amount of delay which the police like to impose. If it were done with an unreasonable delay, and if the justices thought it right to issue a summons, it might well be that the defendant would have some cause of complaint. But that is not the point which we are asked to decide in this case and I need say no more, therefore, than that if the construction of that part of the section does ever arise I should want to consider it.

Appeal dismissed.

Solicitors: *Seifert, Sedley & Co.; Director of Public Prosecutions.*

S. C.

END OF VOL. II AND OF KING'S BENCH SERIES FOR 1951

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Francis Jackson Developments Ld. *v.* Hall - - - - - **C. A. 488**

18. —— *Premium—Payment of money to builder, not landlord, as condition of grant of lease—Landlord and Tenant (Rent Control) Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *ss.* 1, 2, 18; *Sched. I, Part* 1.
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19. —— *Reference by tenant — Tenant's allegation of oral agreement to let unfurnished — Allegation by landlord that letting furnished—Tribunal's jurisdiction to determine nature of letting—Furnished Houses (Rent Control) Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 34) —*Landlord and Tenant (Rent Control) Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 40)—*Rent and Mortgage Interest Restrictions Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 10.
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2. —— *Local authority's delegation of powers and duties to committee—Members of committee appointed for ensuing year—Power of local authority to determine membership of committee within the year—Local Government Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *ss.* 85, 96 *and Sch. III, Part V, cl.* 4.
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3. —— *Street trading—Registration of street trader by borough council—Cancellation of registration—Appeal by trader to magistrate—Reversal of cancellation—Whether borough council a "person aggrieved" by magistrate's order—No right of appeal to quarter sessions—London County Council (General Powers) Act*, 1947 (11 *&* 12 *Geo.* 6, *c. xlvi*), *ss.* 25, 64.
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4. —— *Superannuation—Pension—Transfer of local government officer to same work with London Passenger Transport Board—Pension from superannuation fund of local authority—Whether local authority empowered to make increase under Pensions (Increase) Acts*, 1944 *and* 1947—*London Passenger Transport Act*, 1933 (23 *Geo.* 5, *c.* 14), *s.* 80, *sub-s.* 9—*Pensions (Increase) Act*, 1944 (7 *&* 8 *Geo.* 6, *c.* 21), *s.* 1, *sub-s.* 1; *Sch. I, Pt. II, para.* 1—*Pensions (Increase) Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 7).
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2. —— *Wages—Remuneration—Catering industry—Unlicensed restaurant—Waiters receiving as wages from employer less than the prescribed statutory minimum remuneration—Weekly share-out of tips-pool in custody of employer—Total weekly sum received in excess of statutory minimum remuneration—Whether offence committed—Catering Wages Act*, 1943 (6 *&* 7 *Geo.* 6, *c.* 24)—*Wages Regulation (Unlicensed Place of Refreshment) Order*, 1949 (*S.I.* 1949, *No.* 433).
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2. —— *Personal injuries—Injury to husband resulting in sexual impotence—Claim by wife against defendants for interference with consortium.*
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PRACTICE AND PROCEDURE—*Costs—Legal Aid—Application by defendant to remit to county court failing plaintiff's security for costs—Jurisdiction to order transfer although plaintiff assisted person—County Courts Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 46—*Legal Aid and Advice Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 1, *sub-s.* 7; *s.* 2, *sub-s.* 2; *s.* 12, *sub-s.* 2—*Legal Aid and Advice Act*, 1949 (*Commencement*) *Order*, 1950 (*S.I.* 1950, *No.* 1357)—*Legal Aid (General) Regulations*, 1950 (*S.I.* 1950, *No.* 1359), *reg.* 17.
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2. —— *Husband and wife—Occupation by wife of matrimonial home—Possession sought by husband—Agreed order for possession, suspended subject to conditions—" Liberty to " apply "—Meaning—No power of court to vary order—Question raised by application not connected with working out of order—Married Women's Property Act*, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.
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2. —— *De-rating—" Industrial heredita- " ments "—Premises used for packing articles for export—Special process enabling packed articles to withstand tropical climate in storage—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149, *sub-s.* 1—*Rating and Valuation (Apportionment) Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3, *sub-s.* 1.
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2. —— *Goods vehicle — " C " licence — Condition forbidding carriage of goods for hire or reward — Vehicle used by person other than licence-holder for carriage of goods for hire or reward — Failure to fix identity certificate—Both offences committed by licence-holder—Road and Rail Traffic Act*, 1933 (23 *&* 24 *Geo.* 5, *c.* 53), *s.* 2, *sub-ss.* 4 *and* 5, *and s.* 9—*Goods Vehicles (Licences and Prohibitions) Regulations*, 1936 (*St. R. & O.*, 1936, *No.* 269), *reg.* 12, *sub-reg.* 2.
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3. —— *Goods vehicles—Excessive period of driving—Driver handling parcels as a sorter after driving—Not time spent on " work in " connexion with a vehicle "—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 19.
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4. —— *Omnibus Company*—100 *per cent. subsidiary of British Transport Commission — Company's application to vary fares made to licensing authority—Jurisdiction of authority—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 72—*Transport Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *ss.* 2, *sub-ss.* 1, 2 (*f*) (*g*) (*i*), 3, 63–5, 76.
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5. —— *Speed-limit signs on road with no street lighting—Motor car travelling at more than thirty miles an hour—Prescribed signs prima facie evidence that road to be regarded as a built-up area—No formal proof of direction by order of local authority necessary—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 10—*Road Traffic Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *ss.* 1, 36 *and* 49—*Emergency Laws (Transitional Provisions) Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 26), *Sch. II.*
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7. —— *Use of motor vehicle on road by disqualified driver — Prima facie sentence of imprisonment—" Special circumstances of the " case " justifying lighter sentence — Construction—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 7, *sub-s.* 4.
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2. —— *Compulsory purchase order — Land ripe for development—Proposed sale of building site—Price exceeding existing use value—Proposed purchaser to pay development charge —Assignment to him of compensation for loss of development value—Land acquired by Central Land Board for benefit of purchaser—Policy of Board—Validity of order—Acquisition of Land (Authorization Procedure) Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sch. I, para.* 15—*Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 43, *sub-ss.* 1 *and* 2—*Town and Country Planning (Development Charge) Regulations*, 1948 (*S.I.* 1948, *No.* 1189), *reg.* 2; *Sch., para.* 1.
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3. —— *Compulsory purchase order—Objection by person aggrieved — On ground that authorization not empowered by statute — Application to be made within six weeks from notice of confirmation order, etc., first published—Proposed amendment by adding further reason for objection—Jurisdiction—Acquisition of Land (Authorization Procedure) Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sched. I, Part IV, paras.* 15 (1) *&* 16—*R. S. C., Ord.* 55b, *rr.* 71, 73 *and* 75.
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5. —— *Highways—Closing of highways by Minister of Transport's order—One highway by Regulation and Inclosure (Totternhoe) Provisional Orders Confirmation Act*, 1886 (49 *Vict. c. xvi*) "*so far as practicable to be preserved in "its present condition"—Right of user of others granted to public by some Act—Principle of Generalia specialibus non derogant not applicable—Act of* 1886 *not overridden by Minister's order—Town and Country Planning Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 12, *sub-s.* 2; *s.* 49, *sub-s.* 1; *and s.* 118, *sub-s.* 1—*Stopping up of Highways (Bedfordshire) (No.* 1) *Order*, 1949 (*S.I.* 1949, *No.* 2130).
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